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Supreme Court, U.S.
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No. 06-

IN THE

Supreme Court of the United States

DOW CORNING CORPORATION,

Petitioner,

v.

OFFICIAL COMMITTEE OF UNSECURED CREDITORS, MERRILL LYNCH, PIERCE, FENNER & SMITH, BANK OF AMERICA, N.A., BANK OF NEW YORK, JP MORGAN CHASE, DK ACQUISITION PARTNERS, L.P., HALCYON MANAGEMENT CO. LLP, HALCYON OFFSHORE MANAGEMENT CO., LLC, ANGELO, GORDON & CO., DAVIDSON KEMPNER INTERNATIONAL ADVISORS, M.H. DAVIDSON CO., INC., APPALOOSA MANAGEMENT, LLC, FRANKLIN MUTUAL ADVISORS, LLC, BEAR STEARNS & CO., INC., BEAR STEARNS GOVERNMENT SECURITIES, INC., BEAR STEARNS INVESTMENT PRODUCTS, INC., CUSTODIAL TRUST CO., NEWSTART FACTORS, INC., FARALLON CAPITAL PARTNERS, L.P., FARALLON CAPITAL INSTITUTIONAL PARTNERS, L.P., FARALLON CAPITAL INSTITUTIONAL PARTNERS II, L.P., FARALLON CAPITAL INSTITUTIONAL PARTNERS III, L.P., FARALLON CAPITAL OFFSHORE INVESTORS, INC., FARALLON CAPITAL MANAGEMENT, LLC, JP MORGAN CHASE BANK, CONSOLIDATED PRESS INTERNATIONAL, THE COMMON FUND, TINICUM PARTNERS LP, CREDIT SUISSE FIRST BOSTON MANAGEMENT CORP., AMROC INVESTMENTS, INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Sixth Circuit erred by holding, in direct conflict with the Fourth, Fifth, and Ninth Circuits, that a bankruptcy court may not interpret a confirmed plan of reorganization in a way that would violate the Bankruptcy Code, thereby depriving such a plan of finality and allowing parties to challenge its legality at any time.

2. Whether the Sixth Circuit erred by holding, in direct conflict with the Ninth Circuit, that a bankruptcy court may award creditors attorneys' fees and costs under pre-petition contracts with the debtor for litigating post-petition matters of federal bankruptcy law.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioner Dow Corning Corporation states that it is 50% owned by Corning Incorporated, and 50% owned by Dow Holdings, Inc., a wholly owned subsidiary of The Dow Chemical Company. No other publicly held corporation owns 10% or more of petitioner's stock.

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INTRODUCTION

This Court's review is warranted because the Sixth Circuit has decided two important questions of federal bankruptcy law in a way that is not only incorrect, but also conflicts with decisions from other federal courts of appeals.

As a threshold matter, the Sixth Circuit held that a bankruptcy court may not interpret a confirmed plan of reorganization in a way that would violate the Bankruptcy Code. The effect of that holding is to allow parties to challenge such a plan's legality at any time, and deprive it of finality. That holding not only conflicts with holdings from the Fourth, Fifth, and Ninth Circuits, *see Stratosphere Litig. L.L.C. v. Grand Casinos, Inc.*, 298 F.3d 1137, 1143 (9th Cir. 2002); *In re Varat Enters., Inc.*, 81 F.3d 1310, 1315-17 (4th Cir. 1996); *Republic Supply Co. v. Shoaf*, 815 F.2d 1046, 1050 (5th Cir. 1987), but also strikes at the very heart of a stable and predictable bankruptcy regime. The whole point of plan confirmation, after all, is to fix the parties' respective rights and obligations, which could not happen if the parties were free to challenge the legality of confirmed plans at any time, even years after confirmation.

The Sixth Circuit next held that a bankruptcy court may award creditors attorneys' fees and costs under pre-petition contracts with the debtor for litigating post-petition matters of federal bankruptcy law. In so holding, the Sixth Circuit expressly rejected a line of contrary Ninth Circuit authority. *See, e.g., Thrifty Oil Co. v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 322 F.3d 1039, 1040-42 (9th Cir. 2003); *Renfrow v. Draper*, 232 F.3d 688, 694 (9th Cir. 2000); *In re Baroff*, 105 F.3d 439, 440-42 (9th Cir. 1997); *In re Fobian*, 951 F.2d 1149, 1153 (9th Cir. 1991). This Court recently granted certiorari in a case arising from the Ninth Circuit to resolve this very conflict. *See Travelers Cas. & Sur. Co. v. PG&E Co.*, 167 Fed. Appx. 593 (9th Cir. 2006) (unpublished), *cert. granted*, __ S. Ct.

__, 2006 WL 1520766, 75 U.S.L.W. 3020 (U.S. Oct. 6, 2006) (No. 05-1429). Accordingly, while this Court should grant a writ of certiorari in this case to resolve the circuit conflict with respect to the first question presented (which is independent of the second question, and will not be affected by the outcome in *Travelers*), at the very least this Court should hold the petition pending the disposition of *Travelers*.

OPINIONS BELOW

The Sixth Circuit's decision is reported at 456 F.3d 668, and reprinted in the Appendix (App.) at 1-31a. The district court's unreported decision is reprinted at App. 34-53a. The bankruptcy court's unreported order is reprinted at App. 54a, and the bankruptcy court's oral ruling explaining the basis for that order is reprinted at App. 55-71a.

JURISDICTION

The Sixth Circuit rendered its decision on July 26, 2006. App. 1a. The Sixth Circuit subsequently denied a timely petition for rehearing *en banc* on October 31, 2006. App. 32-33a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT STATUTORY PROVISION

11 U.S.C. § 1141(a) provides:

> Except as provided in subsections (d)(2) and (d)(3) of this section, the provisions of a confirmed plan bind the debtor, any entity issuing securities under the plan, any entity acquiring property under the plan, and any creditor, equity security holder, or general partner in the debtor, whether or not the claim or interest of such creditor, equity security holder, or general partner is impaired under the plan and whether or not such creditor, equity security holder, or general partner has accepted the plan.

STATEMENT OF THE CASE

Petitioner Dow Corning, a manufacturer of silicone breast implants, filed for Chapter 11 bankruptcy reorganization in May 1995. Among its creditors are respondents here, who own petitioner's unsecured commercial debt. There is no dispute that petitioner owes respondents "pendency interest" (*i.e.*, interest that accrued during the pendency of the bankruptcy) on that debt. Rather, the dispute here involves the *rate* of pendency interest that petitioner must pay. That point has been hotly disputed from the outset.

Petitioner originally proposed a plan of reorganization that provided for pendency interest at a statutory rate: "the Federal judgment rate provided in 28 U.S.C. § 1961 in effect on the Petition Date (6.28%), compounded annually on each anniversary of the Petition Date." Amended Plan §§ 1.24, 5.1, C.A. Joint App. 50, 83-84. Respondents objected to the proposed plan, arguing that because petitioner was solvent, it was liable for pendency interest not only at the rate set forth in the parties' contracts, but at the rate set forth for parties in default under those contracts. *See, e.g.*, C.A. Joint App. 808 (arguing that respondents are "entitled to the *default* rate of interest provided in the Loan Agreements") (emphasis added). Respondents voted against the plan.

In urging the bankruptcy court not to confirm the proposed plan, respondents argued that it violated 11 U.S.C. § 1129(b), which requires that a plan be "fair and equitable" to creditors in a dissenting class. According to respondents, the proposed plan would violate this provision unless they were paid pendency interest at the contractual default rates. The court (Spector, J.) agreed with respondents that "the Plan provision fixing the pendency interest rate at that which applies to federal judgments is not 'fair and equitable,'" and that respondents were entitled to pendency interest "in accordance with the terms of the parties' contracts." *In re*

Dow Corning Corp., 244 B.R. 678, 696 (Bankr. E.D. Mich. 1999). The court did not agree with respondents, however, that interest "in accordance with the terms of the parties' contracts" meant interest at the contractual *default* rates, as opposed to the contractual *base* rates: "In determining the applicable rate, ... no effect is to be given to contractual provisions which purport to define as a default the filing of a voluntary petition for bankruptcy relief." *Id.*; *see also id.* (citing four cases for the proposition that creditors cannot recover pendency interest at contractual *default* rates as a result of a bankruptcy filing). The court thus took a middle path between the federal judgment rate proposed by petitioner and the much higher contractual default rates sought by respondents.

In that same ruling, the bankruptcy court deemed petitioner's plan of reorganization to "have been verbally amended to provide that pendency interest will be paid to [respondents] in accordance with the terms of [their] contracts," *id.*, and confirmed the plan. Respondents did not seek clarification of interest "in accordance with the terms of the parties' contracts," and did not appeal the order of confirmation.

Petitioner subsequently objected to respondents' proofs of claim to the extent that they sought pendency interest at the contractual default rates. Respondents insisted that they were entitled to interest at those rates, and moved for summary judgment on this issue. The bankruptcy court denied the motion. App. 54-71a.

As the bankruptcy court explained, "a straightforward application of the plan terms would mean that the creditors are entitled only to the *base* contract rate of interest." App. 58a (emphasis added); *see also* App. 60a ("[T]he Court does not see how one can reconcile [respondents'] demand for default-rate interest with the plan's provision for application of the interest rate in effect when [petitioner] filed its [Chapter 11] petition.").

And, because the plan had long since been confirmed, respondents were not free to challenge the legality of its terms. App. 59a ("[O]nce a bankruptcy plan is confirmed, its terms are not subject to collateral attack.") (internal quotation omitted); *id.* ("Section 1141(a) ... binds both the creditors and the debtor to the terms of a confirmed plan."). As the bankruptcy court explained, respondents were "in effect seeking to modify the plan," which they were not entitled to do.

Separately, the bankruptcy court denied respondents' motion for summary judgment on whether they were entitled, under their pre-petition contracts, to recover post-petition attorneys' fees and costs for litigating bankruptcy-related issues. App. 63-69a. Even assuming that § 506(b) of the Bankruptcy Code did not preclude an award of such fees and costs, the court explained, they are not allowable as claims under § 502(b) of the Code because respondents "held no pre-petition claim for costs, as the breach ... giving rise to a right of reimbursement occurred post-petition." App. 68a.

Respondents appealed, but the district court (Hood, J.) affirmed on all scores. The court noted that "[t]here is no dispute that the Bankruptcy Court in its December 1999 opinion ruled that the Amended Joint Plan was ... amended to provide that [respondents] would be paid pendency interest 'in accordance with the terms of the parties' contracts.'" App. 47a (quoting *In re Dow Corning*, 244 B.R. at 696). The court then held that "the Bankruptcy Court did not abuse its discretion in determining that th[is] amendment ... presumed that the contract rate to be applied was the *base* contract rate (in accordance with the terms of the parties' contracts) applicable on the day the Petition for bankruptcy was filed by the Debtor." App. 47a (emphasis added). Indeed, the court noted that the default rates could not possibly apply because "[p]endency interest begins with the commencement of the case. At that time all parties appear to agree that the Debtor was not in default and

therefore the default rate was not in effect." App. 47-48a. Accordingly, "[t]he Bankruptcy Court did not abuse its discretion in denying [respondents'] summary judgment motions" with respect to the interest rate. App. 49a.

Separately, the district court also affirmed the bankruptcy court's order denying respondents' motion for summary judgment with respect to their entitlement to post-petition attorneys' fees under their pre-petition contracts with petitioner. App. 49-53a. According to the district court, "[a]ttorney fees may be awarded to an unsecured creditor in a bankruptcy proceeding only to the extent that state law governs the substantive issues and authorizes the court to award fees." App. 52a (citing *Renfrow*, 232 F.3d at 694). "Inasmuch as [respondents] have not shown that they have incurred attorney fees in litigating the validity of their contracts," the district court held, "the Bankruptcy Court did not abuse its discretion in denying their summary judgment motion." App. 53a.

Respondents again appealed, and the Sixth Circuit reversed. As a threshold matter, however, the appellate court rejected respondents' argument that the bankruptcy court had "modified" the confirmed plan by holding that respondents were not entitled to default interest rates under the plan. App. 11a. As the Sixth Circuit explained, "the bankruptcy court's 2001 decision merely interpreted, rather than modified, the amended plan." *Id.*; *see also id.* ("The language of the bankruptcy court's 2001 decision makes clear that it was only interpreting the language of the amended plan, not modifying it.").

The Sixth Circuit also rejected respondents' argument that the bankruptcy court had "abused its discretion ... by incorrectly interpreting its prior language." App. 11a. As the appellate court noted, the confirmed plan provided for interest "at the applicable contract rate," and the bankruptcy court was entitled to interpret that provision to mean the non-default interest rates, rather than the higher default rates. App. 12-14a.

Notwithstanding its conclusion that the bankruptcy court had reasonably interpreted the terms of the confirmed plan, the Sixth Circuit proceeded to entertain respondents' challenge to the legality of the bankruptcy court's order under 11 U.S.C. § 1129. *See* App. 14-19a. According to the Sixth Circuit, the bankruptcy court necessarily abused its discretion "if it construed the plan in such a way as to cause it to violate" the Bankruptcy Code. *Id.* at 14a.

On the merits of the § 1129 issue, the Sixth Circuit concluded that where (as here) a debtor is solvent, that provision presumptively requires the payment of pendency interest at contractual default rates. *Id.* at 14-19a. The Sixth Circuit then held that the bankruptcy court, in "approv[ing] the plan over the objections of [a] dissenting class," had failed to apply that presumption. *See* App. 15a, 19a. Accordingly, the appellate court reversed the district court's decision affirming the bankruptcy court's order awarding respondents pendency interest at the contractual base rate, and remanded the case for the bankruptcy court to determine whether the Sixth Circuit's presumptive rule should apply on the facts of this case. *See id.* at 19a.

Separately, the Sixth Circuit also reversed the district court's ruling on attorneys' fees. *See* 19-31a. According to the Sixth Circuit, nothing in the Bankruptcy Code explicitly or implicitly "prohibit[s] the recovery of reasonable post-petition attorneys' fees, costs and expenses," at least where (as here) the debtor is solvent. App. 20a. Thus, the Sixth Circuit held, "[w]e ... choose to join the body of cases holding that unsecured creditors may recover their attorneys' fees, costs and expenses from the estate of a solvent debtor where they are permitted to do so by the terms of their contract and applicable non-bankruptcy law." App. 24a. In so holding, the Sixth Circuit expressly rejected a line of contrary Ninth Circuit authority. App. 28-29a (citing, *inter alia*, *Thrifty Oil*, 322

F.3d at 1040-42; *Renfrow*, 232 F.3d at 694; *Baroff*, 105 F.3d at 440-42; *Fobian*, 951 F.2d at 1153).

REASONS FOR GRANTING THE WRIT

I. The Sixth Circuit Erred, And Undermined The Bedrock Principle Of Finality In Bankruptcy Cases In Conflict With Other Circuits, By Holding That A Bankruptcy Court May Not Interpret A Confirmed Plan In A Way That Would Violate The Bankruptcy Code.

The Sixth Circuit erred by holding, in direct conflict with the Fourth, Fifth, and Ninth Circuits, that a bankruptcy court may not interpret a confirmed plan of reorganization in a way that would violate the Bankruptcy Code, thereby depriving such a plan of finality and allowing parties to challenge its legality at any time. *Compare* App. 14-15a *with Stratosphere*, 298 F.3d at 1143; *Varat*, 81 F.3d at 1315-17; *Republic Supply*, 815 F.2d at 1050. It is hard to overstate the impact of that decision on the stability and predictability of the federal bankruptcy system: if the decision below is allowed to stand, confirmed plans of reorganization will always remain vulnerable to legal challenges in the Sixth Circuit, and there will be no such thing as finality in a Chapter 11 reorganization.

Finality, of course, is the whole point of plan confirmation. Thus, once a bankruptcy court has confirmed a plan and any appeals from the order of confirmation have been exhausted, the plan's legality is conclusively established. *See, e.g.*, 11 U.S.C. § 1141(a) (confirmed Chapter 11 plan "bind[s] the debtor ... and any creditor ... whether or not such creditor ... has accepted the plan"); *Adair v. Sherman*, 230 F.3d 890, 894 (7th Cir. 2000) ("[O]nce a bankruptcy plan is confirmed, its terms are not subject to collateral attack."); *See, e.g.*, 8 *Collier on Bankruptcy* ¶ 1141.02[4] (15th ed. rev. 2006) ("Confirmation of a plan acts as a final judgment. All questions that could have been raised that pertain to the

confirmed plan are barred by the doctrine of *res judicata*."). At that point, the only remaining question is what the plan says, not whether what the plan says comports with the Bankruptcy Code.

Here, the bankruptcy court interpreted petitioner's plan of reorganization (which the bankruptcy court itself had confirmed) to require pendency interest at the contractual *base* rate, instead of the contractual *default* rate. App. 57-61a. As the Sixth Circuit recognized, the bankruptcy court did not thereby impermissibly "modify" the terms of the confirmed plan. *See* App. 11a ("[T]he bankruptcy court's 2001 decision merely interpreted, rather than modified, the amended plan."). And that interpretation, as both the district court and the Sixth Circuit held, was—at the very least—reasonable. *See* 12-14a, 47-49a. As the Sixth Circuit put it, respondents "have not met the extremely difficult burden of demonstrating ... that the bankruptcy court incorrectly interpreted its own prior language or intent," and "[a]ccordingly, the bankruptcy court cannot be said to have abused its discretion by interpreting its own words incorrectly." App. 14a. That should have been (and in the Fourth, Fifth, and Ninth Circuits, would have been) the end of the matter: whether or not the terms of the confirmed plan, as permissibly interpreted by the bankruptcy court, violated the Bankruptcy Code is beside the point.

The Sixth Circuit, however, insisted that a second analytical step was necessary. "Although the bankruptcy court did not abuse its discretion by interpreting the plan as requiring the payment of pendency interest at a non-default, fixed rate, the bankruptcy court still may have done so if it construed the plan in such a way as to cause it to violate § 1129(b)'s fair and equitable requirement." App. 14a. That is so, the Sixth Circuit declared, because "a bankruptcy court's exercise of its equitable powers is cabined by the provisions of the Bankruptcy Code," and "[b]ankruptcy courts may approve a reorganization plan"

only to the extent the plan is "not inconsistent with the applicable provisions of the Bankruptcy Code." App. 15a (internal quotations and brackets omitted).

With all due respect, that assertion is a *non sequitur*. There is no question that bankruptcy courts must follow the provisions of the Bankruptcy Code when deciding whether to confirm a plan in the first instance. But that does not mean that parties remain free to challenge the legality of a plan at any time, even *after* confirmation. Respondents here had a full and fair opportunity to challenge the plan's legality, and/or clarify its scope, at the time of its confirmation. If the plan was ambiguous, they could and should have sought to clear up any such ambiguity. *See, e.g.*, *In re Harvey*, 213 F.3d 318, 322 (7th Cir. 2000); *In re Haynes*, 107 B.R. 83, 86 (Bankr. E.D. Va. 1989). Having failed to do so, respondents cannot now challenge the legality of the confirmed plan.

The Sixth Circuit's decision to entertain such a challenge squarely conflicts with decisions from the Fourth, Fifth, and Ninth Circuits. Thus, in *Republic Supply*, the Fifth Circuit held that a party to a Chapter 11 bankruptcy proceeding may not challenge the legality of a provision of a confirmed plan of reorganization. *See* 815 F.2d at 1049-50. In that case, the plan released a third-party non-debtor (a principal of the debtor) from a personal guaranty to a creditor. *See id.* at 1047-49. Before the plan was confirmed, the creditor sued the principal on that guaranty, but did not object to the plan. *See id.* at 1048. After the plan was confirmed, the principal raised the defense of *res judicata*, but the creditor argued that the plan could not lawfully discharge a non-debtor's liabilities. *See id.* at 1049. The district court agreed with the creditor, but the Fifth Circuit reversed.

On appeal, the creditor argued that "*res judicata* is not the issue in this case," and that the Fifth Circuit "should simply interpret the Plan so as to read it devoid of

the objectionable provision, since that is the only way to view the Plan as being consistent with the bankruptcy law," which does not authorize a discharge of non-debtors. *Id.*; *see also id.* ("[The creditor] contends that a [plan] provision that releases guarantors is without effect because it is beyond the authority of the bankruptcy court.") (citing 11 U.S.C. § 524); *id.* at 1050 ("The creditor] asserts that a proper interpretation of the Plan consistent with section 524 would simply delete the provision releasing [the principal's] guaranty."). The Fifth Circuit squarely rejected that argument: "Regardless of whether that provision is inconsistent with the bankruptcy laws or within the authority of the bankruptcy court, it is nonetheless included in the Plan, which was confirmed by the bankruptcy court without objection and was not appealed." *Id.* As the Fifth Circuit explained, the creditor, "in effect, is now seeking to appeal the confirmed Plan and asking us to review it on its merits," but "[q]uestions of the propriety or legality of the bankruptcy court confirmation order are ... properly addressable on direct appeal," and could not be raised later in a collateral attack on a confirmed plan. *Id.*

Similarly, in *Stratosphere*, the Ninth Circuit rejected the argument that "the bankruptcy court lacked the power to release" the liability of a third-party non-debtor. 298 F.3d at 1143. As the court explained:

> It is true that a bankruptcy court cannot confirm a reorganization plan that discharges the liabilities of a third party. However, [a creditor] is barred from collaterally challenging the bankruptcy court's confirmation of [the debtor's] second reorganization plan. *This would be so even if the plan contained illegal provisions.*

Id. (emphasis added) (citing *In re Pardee*, 193 F.3d 1083, 1086 (9th Cir. 1999), and *In re Gregory*, 705 F.2d 1118, 1121 (9th Cir. 1983)). Accordingly, the *Stratosphere* court

held that the alleged illegality of a bankruptcy court's order provided no basis for denying that order *res judicata* effect. *See* 298 F.3d at 1143.

And in *Varat*, the Fourth Circuit also held that a party to a Chapter 11 bankruptcy proceeding may not challenge the legality of a provision of a confirmed plan of reorganization. *See* 81 F.3d at 1314-17. In that case, the plan classified a claim by a particular creditor (a law firm) as a secured claim. *See id.* at 1313. After the plan was confirmed, another creditor (a bank that had not objected to the confirmation) sought to argue that the law firm's claim should not have been so classified under the Bankruptcy Code. *See id.* at 1314. In particular, the bank argued that "no legal basis supported [the law firm's] alleged secured status." *Id.* at 1317. The Fourth Circuit refused to entertain that argument on *res judicata* grounds: "We hold that the confirmation order precludes consideration of [the bank's] present objections on the merits." *Id.* To the extent the bank believed that the confirmation order was unclear, it could and should have sought clarification before the plan was confirmed. *See id.* at 1316.

The decision below necessarily conflicts with these decisions by holding that a bankruptcy court may not interpret a confirmed plan of reorganization in a way that would violate the Bankruptcy Code. Once a plan has been confirmed, its legality is no longer open to question through any challenge other than a direct appeal from the confirmation order. *See, e.g., Celotex Corp. v. Edwards*, 514 U.S. 300, 313 (1995); *Stoll v. Gottlieb*, 305 U.S. 165, 171-72 (1938) (same). That principle is not unique to cases under Chapter 11 of the Bankruptcy Code, but also applies with full force to cases under Chapter 13 of the Code. *See, e.g., Adair*, 230 F.3d at 895 ("Allowing collateral attacks [on the legality of provisions contained in the confirmed plan] would give [parties] an incentive to refrain from objecting in the bankruptcy proceeding and would thereby destroy the finality that bankruptcy

confirmation is intended to provide."); *Pardee*, 193 F.3d at 1086 ("This court has recognized the finality of confirmation orders even if the confirmed bankruptcy plan contains illegal provisions."); *In re Szostek*, 886 F.2d 1405, 1406 (3d Cir. 1989) ("[A]fter the plan is confirmed the policy favoring the finality of confirmation is stronger than the bankruptcy court's ... obligation[] to verify a plan's compliance with the Code."); *Gregory*, 705 F.2d at 1121 (creditor's failure to raise objection to plan legality "at the confirmation hearing or to appeal from the order of confirmation should preclude its attack on the plan or any provision therein as illegal in a subsequent proceeding"). Indeed, that principle simply reflects the general rule of *res judicata* that the "consequences of a final, unappealed judgment on the merits [are not] altered by the fact that the judgment may have been wrong." *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981). That rule, in turn, reflects the fundamental "policy judgment that in most matters it is more important that the applicable rule of law be settled than that it be settled right." *Agostini v. Felton*, 521 U.S. 203, 235 (1997) (internal quotation omitted).

To be sure, courts should strive to interpret confirmed bankruptcy plans in a manner consistent with the Bankruptcy Code, just as courts should strive to interpret statutes in a manner consistent with the Constitution. *See, e.g., Clark v. Martinez*, 543 U.S. 371, 385 (2005). But that is not what the Sixth Circuit did here. The appellate court expressly concluded that "the bankruptcy court did *not* abuse its discretion by interpreting the plan as requiring the payment of pendency interest at a non-default, fixed rate," and then proceeded to reverse the bankruptcy court's decision on the ground that the court had not conducted a proper "fair and equitable" analysis under § 1129(b). App. 14a (emphasis added). The latter point is not a matter of plan *interpretation*; it is purely a matter of plan *legality*. Indeed, the Sixth Circuit's decision to remand the case for further "consideration of

any equitable factors affecting the interest rate," App. 19a, confirms that the court moved beyond issues of plan interpretation, because the consideration of such factors has nothing to do with the proper interpretation of the plan.

The upshot of the decision below is that, in the Sixth Circuit at least, confirmed plans will always remain vulnerable to legal challenges, and there will be no such thing as finality in a Chapter 11 reorganization. As a practical matter, it is hard to imagine a more fundamentally destabilizing regime. The frenetic negotiating and litigating that characterize Chapter 11 reorganizations have always had an end point, when the rules of the road are settled. Both debtors and creditors need to know when they have reached this end point, so they can cut their losses and move on. By holding that a bankruptcy court has no discretion to interpret a confirmed plan in a way that would violate the Bankruptcy Code, the decision below eliminates this end point and condemns parties to perpetual litigation over plan legality. This is not an issue that categorically favors any one side over another: although the result here happens to favor a class of creditors, by possibly forcing the debtor to pay tens of millions of dollars in additional interest that it did not owe under the confirmed plan, all parties benefit from knowing the rules of the road.

Indeed, it is hard to think of a case that illustrates the point more dramatically than this one. Petitioner's bankruptcy was, to put it mildly, exhaustively negotiated and litigated. *See, e.g., In re Dow Corning Corp.*, 419 F.3d 543 (6th Cir. 2005); *In re Dow Corning Corp.*, 280 F.3d 648 (6th Cir. 2002); *In re Dow Corning Corp.*, 142 F.3d 433, 1998 WL 180596 (6th Cir. 1998) (unpublished); *In re Dow Corning Corp.*, 113 F.3d 565 (6th Cir. 1997); *In re Dow Corning Corp.*, 103 F.3d 129, 1996 WL 668567 (6th Cir. 1996) (*per curiam*) (unpublished); *In re Dow Corning Corp.*, 86 F.3d 482 (6th Cir. 1996). The arduous path to a confirmed plan of reorganization required compromises by

all sides. The plan was confirmed more than seven years ago, and petitioner emerged from bankruptcy (after nine years) more than two years ago. The plan has now been substantially consummated, and petitioner has paid its various creditors (including respondents) almost *$3 billion* to date under the plan. For the Sixth Circuit now to open the door to challenges to the legality of the plan is to call this entire Herculean effort into question. Given that the decision below departs from precedent and jeopardizes bankruptcy policies of the highest order, this case warrants this Court's review.

II. The Sixth Circuit Erred, And Deepened A Circuit Conflict That This Court Already Has Agreed To Review, By Holding That A Party To A Chapter 11 Bankruptcy Proceeding May Recover Contractual Attorneys' Fees For Litigating Matters Of Federal Bankruptcy Law.

The Sixth Circuit also erred by holding, in direct conflict with the Ninth Circuit, that a party to a Chapter 11 bankruptcy proceeding may recover contractual attorneys' fees for litigating matters of federal bankruptcy law. *See* App. 28-29a (expressly "declin[ing] to follow [a] series of Ninth Circuit cases," including *Thrifty Oil*, 322 F.3d at 1040-42; *Renfrow*, 232 F.3d at 694; *Baroff*, 105 F.3d at 440-42; *Fobian*, 951 F.2d at 1153); *see also Travelers*, 167 Fed. Appx. at 593-94. Indeed, this Court recently granted certiorari in *Travelers* to resolve this very conflict.

The attorneys' fees issue presented here (and in *Travelers*) is wholly independent of the finality issue raised in the first question presented above. Regardless of how the Court rules in *Travelers*, in other words, any such ruling will not affect the resolution of the first question presented. Accordingly, there is no need for this Court to wait for *Travelers* to resolve the second question before deciding whether to grant certiorari on the first

question. At the very least, however, this Court should hold the petition pending resolution of *Travelers*.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 04-1608, 04-1643, 04-1720, 04-1721, 04-1722.

In re: DOW CORNING CORPORATION, Debtor.

Official Committee of Unsecured Creditors, et al., Appellants/Cross-Appellees,

v.

Dow Corning Corporation, Appellee/Cross-Appellant,

Dow Chemical Corporation and Corning Incorporated, Appellees.

Appeal from the United States District Court for the Eastern District of Michigan at Detroit.
No. 01-71843—Denise Page Hood, District Judge.

ARGUED: July 27, 2005.

DECIDED AND FILED: July 26, 2006.

Before MOORE and COLE, Circuit Judges; WISEMAN, District Judge.*

COUNSEL

ARGUED: Donald S. Bernstein, DAVIS, POLK & WARDWELL, New York, New York, Glenn E. Siegel,

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* The Honorable Thomas A. Wiseman, United States District Judge for the Middle District of Tennessee, sitting by designation.

DECHERT, New York, New York, for Appellants. David M. Bernick, KIRKLAND & ELLIS, Chicago, Illinois, for Appellees. **ON BRIEF:** Donald S. Bernstein, Ogden N. Lewis, Michael S. Flynn, DAVIS, POLK & WARDWELL, New York, New York, Glenn E. Siegel, DECHERT, New York, New York, Sheryl L. Toby, DYKEMA GOSSETT, Detroit, Michigan, Annette W. Jarvis, Salt Lake City, Utah, Robert S. Hertzberg, PEPPER & HAMILTON, Detroit, Michigan, Andrew N. Rosenberg, PAUL, WEISS, RIFKIND, WHARTON & GARRISON, New York, New York, Patrick A. Murhpy, MURPHY, WEIR & BUTLER, San Francisco, California, Stephen Blauner, MILBANK, TWEED, HADLEY & McCLOY, New York, New York, Robert M. Novick, KASOWITZ, BENSON, TORRES & FRIEDMAN, New York, New York, for Appellants. David M. Bernick, Douglas Geoffrey Smith, KIRKLAND & ELLIS, Chicago, Illinois, for Appellees.

OPINION

R. GUY COLE, JR., Circuit Judge.

Numerous bankruptcy creditors of Dow Corning Corp., who collectively hold approximately $1 billion in commercial debt, argue that the bankruptcy court erred in only allowing claims for post-petition interest at the non-default contract rate, as identified in their debt contracts, rather than at the contracts' default rate. Dow Corning argues in a cross-appeal that the bankruptcy court should have ordered the payment of post-petition interest at the non-default variable rate required by the contracts, rather than at a numerically fixed rate as of the date of the bankruptcy filing. Finally, the creditors argue that they should be awarded their attorneys' fees, costs and expenses, since Dow Corning has always been fully solvent and is still solvent post-bankruptcy. Because solvent-debtor cases present a situation where all parties ought to be granted the benefit of their bargains, unless

the equities compel a contrary result, we **VACATE** the judgments below and **REMAND** for reconsideration consistent with this opinion.

I. BACKGROUND

Dow Corning is a joint venture wholly owned by its two shareholders, Dow Chemical Co. and Corning Corp. On May 15, 1995, Dow Corning filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code.[1] Unlike most debtors in bankruptcy, Dow Corning was fully solvent at the time it filed its bankruptcy case; it has remained so throughout the proceedings and has never disputed its ability to pay all of its creditors. Rather, the purpose of the bankruptcy petition was to enable prompt and uniform settlement of the numerous breast-implant-related lawsuits pending against Dow Corning at the time of the petition.

During years of negotiations and settlements, Dow Corning continued its business and did not make any payments on its more than $1 billion in unsecured debt. When a reorganization plan was finally proposed in 1999, it included provisions for payment of the principal amount of all of the unsecured debt, along with post-petition interest at the "federal judgment rate" of 6.28%, compounded annually. The majority of the unsecured commercial debt contracts would have required a rate higher than the federal judgment rate. Not surprisingly, the unsecured commercial debt holders (hereinafter

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[1] On April 20, 2005, the Bankruptcy Abuse Prevention and Consumer Protection Act, Pub. L. No. 109-8, 119 Stat. 23 (BAPCPA), was signed into law. Because Dow Corning's bankruptcy petition was filed before April 20, 2005, amendments to the Bankruptcy Code, and all citations to, or quotations of, specific code provisions shall refer to the Code (or particular sections of the Code) prior to its amendment by BAPCPA–i.e., 11 U.S.C. §§ 101-1330 (2000).

"Class 4" or the "Class 4 creditors") voted overwhelmingly against the plan. These creditors are the appellants in this case.

Under the Bankruptcy Code, a plan may not be confirmed by a court over the objection of a class of creditors unless, among other things, the following requirements are met: (1) under the plan, the class would receive an amount that is equal to or greater than the amount they would receive if the debtor's assets were liquidated, *see* 11 U.S.C. § 1129(a)(7); and (2) the plan is found to be fair and equitable, *see* 11 U.S.C. § 129(b)(1). By incorporating the fair and equitable standard in § 1129(b) of the Code, Congress codified the "absolute priority rule," which provides that absent full satisfaction of a creditor's allowed claims, no member of a class junior in priority to that creditor may receive anything at all on account of their claim or equity interest. *See Case v. L.A. Lumber Prods. Co.*, 308 U.S. 106, 115 (1939). Here, the Class 4 creditors objected to the plan on two grounds. First, they argued that they were receiving less than they would have received if Dow Corning were liquidated. Second, they argued that the bankruptcy court's imposition of the federal judgment interest rate, as opposed to the rates required by the debt contracts, meant that Class 4 was not being paid the full interest it was owed, while Dow Corning's two shareholders, both in a class undisputedly junior to Class 4, were retaining millions of dollars in equity. *See In re Dow Corning Corp.*, 244 B.R. 678, 680 (Bankr. E.D. Mich. 1999).

After hearing the objections, the bankruptcy court overruled Class 4's first objection, determining that Class 4 was going to be paid at least as much as it would have received had Dow Corning's assets been liquidated. *In re Dow Corning Corp.*, 237 B.R. 380, 409 (Bankr. E.D. Mich. 1999). However, in a later opinion, the bankruptcy court agreed with Class 4 that the plan as it had previously existed was not "fair and equitable" since junior claims

were being paid while Class 4's allowed claims had not been fully satisfied:

> Where the debtor is *solvent*, the bankruptcy rule is that where there is a *contractual* provision, valid under state law, providing for interest on unpaid installments of interest, the bankruptcy court will enforce the contractual provision with respect to both instalments [sic] due before and ... after the petition was filed.... This rule is fair and equitable inasmuch as the solvent debtor's estate will have been enriched by the bankruptcy trustee's use of money which the debtor had promised to pay promptly to the creditor, and, correspondingly, the creditor will have been deprived of the opportunity to use the money to *his* advantage. Moreover, the rule does not in any way affect any creditor other than the claimant of interest on interest....The Proponents [of the proposed plan] made only a half-hearted effort to persuade the Court that use of the statutory interest rate is fair. They directed the Court's attention to our prior decision, in which we stated in dictum that "the payment of post-petition interest at the federal judgment rate does not provide a windfall to debtors and its use cannot be seen as ... inequitable to unsecured creditors." *Dow Corning*, 237 B.R. at 409. This statement, however, was premised on the view that a chapter 7 creditor's pre-petition contractual rights are essentially replaced by, or merged into, the allowed claim. *See Dow Corning*, 237 B.R. at 391-92, 405, 409. That is not the case with respect to a chapter 11 claim.

In re Dow Corning Corp., 244 B.R. 678, 695-96 (Bankr. E.D. Mich. 1999) (emphasis in the original, some citations omitted). The court stated that it was sustaining Class 4's objections and deemed "the Plan to have been verbally amended to provide that pendency interest will be paid to

Class 4 creditors in accordance with the terms of the parties' contracts." *Id.* at 696. However, this determination was made with one caveat: "In determining the applicable rate, however, no effect is to be given to contractual provisions which purport to define as a default the filing of a voluntary petition for bankruptcy relief." *Id.* Following the bankruptcy court's decision that pendency interest would be paid to Class 4 "in accordance with the terms of the parties' contracts," the plan as a whole was deemed to be "fair and equitable" to Class 4, and it was thus confirmed without a re-vote. The plan includes a choice-of-law provision indicating that New York law shall govern its interpretation.

The plan was to take effect in June 2004, and between 1999 and 2004, Dow Corning and its creditors litigated the validity of the claims that would be paid under the plan. Dow Corning objected to Class 4's claims for money due under a default rate of interest, in addition to other post-petition fees, costs, and expenses. Class 4 moved for summary judgment with regard to these claims. In April 2001, the bankruptcy court held a hearing on these objections, and ruled in favor of Dow Corning. With regard to the default interest rate, the court found that it had not initially awarded default interest, and that Class 4 did not have an automatic right to such interest. It noted that the amended plan provided for post petition interest at "the applicable contract rate ... in effect on May 15, 1995, the date Dow Corning's bankruptcy case commenced." The court ruled it could not award default interest given that there was no evidence that it would be fair and equitable to award additional default interest and because Dow Corning had not been in default on the date of the bankruptcy filing. With regard to post-petition fees, costs and expenses, the court found that *CPT Holdings, Inc. v. Industrial & Allied Employees Union Pension Plan, Local 73*, 162 F.3d 405 (6th Cir. 1998), had effectively overruled prior Sixth Circuit precedent, namely *In re Martin*, 761 F.2d 1163, 1167-68

(6th Cir. 1985), which had held that such charges are recoverable. The bankruptcy court thus granted summary judgment to Dow Corning on this issue as well.

Pursuant 28 U.S.C. § 158(a), Class 4 appealed each of these decisions to the district court. The district court determined first that the bankruptcy court's default interest decision was an interpretation of the terms of the plan, and did not effect a modification of the plan, and was thus subject to abuse-of-discretion review. *In re Dow Corning Corp.*, No. 01-CV-71843-DT, 2004 WL 764654, at *3 (E.D. Mich. March 31, 2004). The district court then found that the bankruptcy court's holding was not an abuse of discretion, noting that numerous bankruptcy courts have chosen not to award default interest even though it was provided for in underlying debt contracts. The district court upheld the bankruptcy court's determinations that the original plan had not included default interest, and that Class 4 had not established that the plan would violate § 1129(b)'s fair-and-equitable standard absent payment of default interest. *Id.* at *9-10. Accordingly, the district court affirmed the decision of the bankruptcy court with regard to default interest, determining that the relevant interest rate would be "the base contract rate in effect between the parties at the time the Petition was filed, and not the default rate, unless the individual claimant can show that [Dow Corning] defaulted pre-petition." *Id.* at *10.

Next, the district court addressed the issue of attorneys' fees, costs and expenses. It disagreed with the bankruptcy court that *CPT Holdings* overruled *Martin*, but nonetheless agreed that these charges were not recoverable by the Class 4 creditors. *Id.* Relying on several Ninth Circuit cases, the district court reasoned that the Bankruptcy Code allows costs incurred in litigating the *validity* of a pre-petition contract, but does not allow costs related to recovering required contract payments in a subsequent federal bankruptcy proceeding. It thus affirmed the bankruptcy court's determination

that Class 4 could not recover its fees and costs. *Id.* at *11-12.

Finally, the parties requested clarification as to the applicable "contract rate in effect at the time of the petition." Dow Corning argued that the plan called for the applicable interest rate on these instruments to vary just as it had pre-petition, as a "formulaically-fixed" rate. Class 4 argued that the bankruptcy court had set the rate to be fixed at the actual numerical value of the formula as of the date the petition was filed. After examining the bankruptcy court's written and oral opinions, as well as language used in its own prior holdings, the district court held that the bankruptcy court had intended to set a numerically-fixed interest rate and that it had not abused its discretion in doing so. The district court thus entered an order setting a fixed rate for the payment of post-petition interest, equal to the rate applicable in each debt contract on the day the petition was filed.

The Class 4 creditors timely appealed the decisions on default interest and costs,[2] and Dow Corning cross-appealed the decision with regard to the numerically-fixed rate of interest. We have jurisdiction pursuant to 28 U.S.C. § 158(d).

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[2] Appellant Bank of New York ("BNY") has filed briefs in this case separate from those of the other Class 4 creditors, primarily because BNY's debt contracts did not include a default rate or variable interest rates, and thus they are not disputing the lower courts' decisions with respect to those issues. Nonetheless, with regard to the issue of fees and costs, the majority of its arguments are effectively the same as those of the remaining creditors (all of whom filed one consolidated brief), and thus we will treat all of these arguments together, noting BNY's one separate argument at the end of the costs section.

II. INTEREST RATE

In its 2001 oral decision, the bankruptcy court held that Dow Corning's 1999 verbal amendment of the plan required that the applicable rate of pendency interest be the contract rate in effect between the parties at the time the petition was filed, as opposed to the default rate. Reviewing for abuse of discretion, the district court affirmed the bankruptcy court's decision and entered an order setting a fixed interest rate equal to the rate applicable to each debt contract on the day Dow Corning's petition was filed. The Class 4 creditors appeal the district court's decision insofar as it affirms the bankruptcy court's order awarding interest at the non-default rate. Dow Corning appeals the district court's decision that post-petition interest is payable at the numerically-fixed interest rate.

1. Standard of Review

The standard of review which we apply to the bankruptcy court's decision depends on whether that decision resulted in a modification of the amended plan, and thus was made in reliance upon or was based on an interpretation of the Bankruptcy Code, or rather simply involved the bankruptcy court's interpretation of that plan. In *In re Terex*, 984 F.2d 170 (6th Cir. 1993), we reviewed a bankruptcy court's interpretation of a reorganization plan for abuse of discretion. *Id.* at 172 (citing *In re Chicago R.R. Co.*, 961 F.2d 1260, 1264 (7th Cir. 1992) and *Barrett v. Sec'y of Health & Human Servs.*, 840 F.2d 1259, 1263 (6th Cir. 1987) (standard of review in equitable actions is abuse of discretion)). "[The bankruptcy court's ruling] did not rely on or interpret the Bankruptcy Code. Its ruling, therefore, cannot be said to constitute a legal conclusion subject to de novo review." *Id.* By contrast, we noted that bankruptcy court decisions that rely on or interpret the Bankruptcy Code are subject to *de novo* review. *Id.*

Following *In re Terex*, Dow Corning argues that the bankruptcy court's decision should be reviewed for abuse of discretion, because the decision was an interpretation of the amended plan's language in exercise of that court's equitable power to award interest. The Class 4 creditors argue that the bankruptcy court's decision should be reviewed *de novo*, because they argue that its 2001 decision effectively modified the amended plan, and thus involved an interpretation of § 1129(b) of the Code. Alternatively, they argue that because, in interpreting the plan, the bankruptcy court did not exercise its equitable powers, the abuse-of-discretion standard applied in *In re Terex* should not govern. Rather, they argue, the bankruptcy court's interpretation of the plan is analogous to the interpretation of a contract, and thus should be reviewed *de novo*. *See Yolton v. El Paso Tenn. Pipeline Co.*, 435 F.3d 571, 577 (6th Cir. 2006) ("Questions of contract interpretation are generally considered questions of law subject to *de novo* review." (citing *Golden v. Kelsey-Hayes Co.*, 73 F.3d 648, 653 (6th Cir. 1996))).

In *In re Terex*, we held that if a bankruptcy court's interpretation of a plan does not require interpretation of the Bankruptcy Code, review for abuse of discretion is appropriate. *In re Terex*, 984 F.2d at 172. Many of our sister circuits similarly review a bankruptcy court's interpretation of the plan for abuse of discretion. *See In re Dial Bus. Forms, Inc.*, 341 F.3d 738, 744 (8th Cir. 2003) ("[A] bankruptcy court's interpretation of a confirmed plan should be reviewed under the abuse of discretion standard."); *In re O'Connor*, 258 F.3d 392, 401 (5th Cir. 2001) ("[The bankruptcy court's] interpretation is entitled to deference." (citing *In re Weber*, 25 F.3d 413, 416 (7th Cir. 1994))); *In re Weber*, 25 F.3d at 416 (reviewing a bankruptcy court's interpretation of the plan with deference). Although it is currently the law in at least one circuit that a bankruptcy court's interpretation of a plan is reviewed *de novo*, *see In re Taylor*, 243 F.3d 124, 128 (2d Cir. 2001) ("The Bankruptcy Court's

interpretation of the text of the Plan, the Confirmation Order, and the Final Decree are conclusions of law reviewed de novo."), we are bound by our own precedent.

Thus, if the bankruptcy court's 2001 decision is an interpretation of the amended plan, it is entitled to deference by this Court, and we will review it for abuse of discretion. In order to determine whether the court's decision merely interpreted the plan, as opposed to modifying it, "we turn to the reasoning and language in the bankruptcy court's [2001] order." *In re Terex,* 984 F.2d at 172. The language of the bankruptcy court's 2001 decision makes clear that it was only interpreting the amended plan, not modifying it. In the bankruptcy court's view, "a straightforward application of the plan terms would mean that the creditors are entitled only to the base contract rate of interest. The creditors would therefore appear to be precluded from seeking to impose a higher rate now." The court denied the Class 4 creditors' objections on the grounds that default interest would be in conflict with the terms of the plan. "In the present case the Court does not see how one can reconcile the creditors' demand for default-rate interest with the plan's provisions for application of the interest rate in effect when Dow Corning filed its petition." This language from the bankruptcy court's opinion strongly suggests that it did not intend to modify the terms of the amended plan in its 2001 decision, but rather only interpreted it in light of the Class 4 creditors' objections. Given that the bankruptcy court's 2001 decision merely interpreted, rather than modified, the amended plan, we review its decision for abuse of discretion.

2. Merits

The Class 4 creditors argue that the bankruptcy court abused its discretion in two ways: (1) by incorrectly interpreting its prior language and thus effectively modifying the plan; and (2) by adopting an interpretation

of the plan caused it to violate § 1129(b)'s fair-and-equitable standard.

a. Incorrect Interpretation

First, the Class 4 creditors argue that the bankruptcy judge incorrectly interpreted its 1999 decision. The verbally amended plan included the following clause: "[P]endency interest will be paid to Class 4 creditors in accordance with the terms of [their] contracts." *In re Dow Corning Corp.*, 244 B.R. at 696. In its 2001 oral decision, the bankruptcy court interpreted this clause to mean that pendency interest would be paid at a flat rate, fixed numerically at the rate that was in effect for each contract on the date Dow Corning filed its bankruptcy petition. The district court agreed with the bankruptcy court's decision, and read it to hold that for those contracts with a variable interest rate, the floating rate is fixed as of the date of the filing of the petition. Nonetheless, the Class 4 creditors argue that the language in the bankruptcy court's 1999 decision can only be interpreted as providing for pendency interest at the contracts' default rates.

In interpreting a confirmed plan, courts use contract principles, since the plan is effectively a new contract between the debtor and its creditors. *See Hillis Motors, Inc. v. Hawaii Auto. Dealers' Ass'n*, 997 F.2d 581, 588 (9th Cir. 1993). State law governs those interpretations, and under long-settled contract law principles, if a plan term is unambiguous, it is to be enforced as written, regardless of whether it is in line with parties' prior obligations. *See id.*; *see also Breed v. Ins. Co. of N. Am.*, 385 N.E.2d 1280, 1282 (N.Y. 1978). A term is deemed ambiguous when it is "capable of more than one reasonable interpretation." *Miller v. United States*, 363 F.3d 999, 1004 (9th Cir. 2004) (quotation omitted). Although the interpretation of an amended plan of reorganization is analogous in many respects to the construction of a contract, we remain mindful that the law of this circuit requires that we

review a bankruptcy court's interpretation of its own decisions with significant deference. *In re Terex*, 984 F.2d at 172.

Here, the amended plan required that pendency interest, defined as "interest that accrues for the time frame beginning with the commencement of this case and ending on the effective date of the Plan," *In re Dow Corning Corp.*, 244 B.R. at 680, "be paid to Class 4 creditors in accordance with the terms of [their] contracts." *Id.* at 696. In its 2001 decision, the bankruptcy court found the phrase "in accordance with the terms of their contracts" to be unambiguous, and held that a straightforward application of the pendency interest clause would limit the recovery of pendency interest to "the applicable contract rate under the terms of the plan." The bankruptcy court's interpretation defined the applicable contract rate as "the rate in effect on May 15, 1995, the date Dow Corning's bankruptcy case commenced," thus declining to allow claims for default interest, since the default rates were not in effect on May 15, 1995.

We disagree with the bankruptcy court's conclusion that the plan was unambiguous. The phrase "at the applicable contract rate" could have any one of several other reasonable meanings, including both "at the non-default contract rate in effect on the date of the petition" and "at the varying rate provided for by the contracts should Dow fail to make a payment." Furthermore, at the time it orally added the "at the applicable contract rate" term to the plan, the bankruptcy court purported to be *sustaining* Class 4's objections regarding the proper interest rate payable on the claims held by members of that class, lending significant weight to Class 4's argument that this term is ambiguous.

Although we disagree that the language is unambiguous, the bankruptcy court's ultimate interpretation of that language did not constitute an

abuse of discretion. The plan's language—"[e]ach allowed unsecured claim in Class 4 shall include interest thereon from the petition date through the effective date at the applicable contract rate"–is not inconsistent with the bankruptcy court's interpretation precluding default interest. Though "the applicable contract rate" could mean several things, one reasonable interpretation of that phrase is the base applicable contract rate on the date of the petition. And since that language is susceptible to more than one interpretation and we give significant deference to the bankruptcy court's decision, the Class 4 creditors have not met the extremely difficult burden of demonstrating on appeal that the bankruptcy court incorrectly interpreted its own prior language or intent. *See, e.g., Terex*, 984 F.2d at 172; *see also O'Connor*, 258 F.3d at 401. Accordingly, the bankruptcy court cannot be said to have abused its discretion by interpreting its own words incorrectly. *See, e.g., Kendrick v. Bland*, 931 F.2d 421, 423 (6th Cir. 1991) (granting "great deference" to a lower court's interpretation of its own orders).

b. Section 1129(b)'s Fair-and-Equitable Standard

Although the bankruptcy court did not abuse its discretion by interpreting the plan as requiring the payment of pendency interest at a non-default, fixed rate, the bankruptcy court still may have done so if it construed the plan in such a way as to cause it to violate § 1129(b)'s fair and equitable requirement. Class 4 argues that the bankruptcy court abused its discretion by interpreting the plan in such a way as to produce a result that violates that section of the Bankruptcy Code, insofar as they will not recover the full value of their claim, while Dow Corning's shareholders, whose equity interests are undisputably junior to the claims held by Class 4, will retain millions of dollars.

Although bankruptcy courts have broad equitable powers that extend to approving plans of reorganization, *United States v. Energy Res. Co., Inc.*, 495 U.S. 545, 549

(1990), these equitable powers are limited by the role of the bankruptcy court, which is to "guide the division of a pie that is too small to allow each creditor to get the slice for which he originally contracted," *In re Chicago*, 791 F.2d 524, 528 (7th Cir. 1986). Thus, a bankruptcy court's exercise of its equitable powers is cabined by the provisions of the Bankruptcy Code. *In re Highland Superstores, Inc.*, 154 F.3d 573, 578-79 (6th Cir. 1998). Bankruptcy courts may approve a reorganization plan that "include[s] any ... appropriate provision not inconsistent with the applicable provisions of [the Bankruptcy Code]." *In re Dow Corning Corp.*, 280 F.3d 648, 656 (6th Cir. 2002) (quoting 11 U.S.C. § 1123(b)(6)).

When one or more class of creditors refuses to accept a plan of reorganization, as did Class 4 here, a bankruptcy court may approve the plan over the objections of the dissenting class only if two criteria are met. First, as with any plan of reorganization, all of the requirements of § 1129(a)—save acceptance by each class of creditors—must be met. *See* § 1129(a)(8). Second, 11 U.S.C. § 1129(b) requires that the plan be fair and equitable. As previously explained, a plan is deemed fair and equitable as to a dissenting class of unsecured creditors only if it does not violate the absolute priority rule—i.e., the allowed value of the claims held by that class is to be paid in full, or "the holder of any claim junior to the claims of such class will not receive or retain under the plan on account of such junior claim any property." *Bank of Am. Nat'l. Trust & Sav. Ass'n v. 203 North LaSalle Street P'ship*, 526 U.S. 434, 441-42 (1999) (citing § 1129(b)(2)(B)(ii)). Class 4 argues that by interpreting the amended plan as not requiring the payment of default interest, the bankruptcy court caused the amended plan to run afoul of the absolute priority rule, because Dow Corning's shareholders, undisputedly junior interest holders, will retain millions of dollars, while Class 4 claim holders will not receive the full benefit of their bargain with the debtor.

Of course, the absolute priority rule applies with equal force when the debtor is solvent, as is the case here. *Consolidated Rock Prods. Co. v. Du Bois*, 312 U.S. 510, 527 (1941). "Whether a company is solvent or insolvent in either the equity or the bankruptcy sense, 'any arrangement of the parties by which the subordinate rights and interests of the stockholders are attempted to be secured at the expense of the prior rights' of creditors 'comes within judicial denunciation.'" *Id.* (citing *Louisville Trust Co. v. Louisville, New Albany & Chicago Ry. Co.*, 174 U.S. 674 (1899)). The absolute priority rule imposes somewhat different requirements when a solvent debtor seeks confirmation of its plan. The legislative history of the Bankruptcy Code makes clear that equitable considerations operate differently when the debtor is solvent: "[C]ourts have held that where an estate is solvent, in order for a plan to be fair and equitable, unsecured and undersecured creditors' claims must be paid in full, including postpetition interest, before equity holders may participate in any recovery." 140 Cong. Rec. H10,752-01, H10,768 (1994) (statement of Rep. Brooks, Chairman of the Committee on the Judiciary and co-author of the Bankruptcy Reform Act of 1994). Class 4 argues that in the context of a solvent debtor, the absolute priority rule requires the award of interest at the default rate.

Since solvent bankruptcy estates are somewhat of a rarity, it comes as no surprise that the majority of courts to consider whether to award default interest have done so in the context of an insolvent debtor. In those cases, bankruptcy courts have concluded that default interest need not be awarded in every instance for a plan to pass muster under § 1129(b)(1). Instead, bankruptcy courts analyze whether § 1129(b) requires the payment of default interest on a case-by-case basis. In *In re Casa Blanca Project Lenders, L.P.*, 196 B.R. 140, 143 (B.A.P. 9th Cir. 1996), the Ninth Circuit held that courts should apply the non-default contract rates, subject to rebuttal

for equitable considerations; such a case-by-case determination allows a bankruptcy court to determine whether the circumstances of a given case warrant an application of the higher default rate. Similarly, in *In re Terry Ltd. P'ship*, 27 F.3d 241, 243 (7th Cir. 1994), the Seventh Circuit held that when the debtor is insolvent, default interest may be awarded based on the facts and equities of each specific case. *See also In re Southland Corp.*, 160 F.3d 1054, 1059-60 (5th Cir. 1998) (holding that in the case of an insolvent debtor, "default interest rate is generally allowed, unless the higher rate would produce an inequitable result") (internal citation omitted).

By contrast, in solvent debtor cases, rather than considering equitable principles, courts have generally confined themselves to determining and enforcing whatever pre-petition rights a given creditor has against the debtor. *See, e.g., Chicago*, 791 F.2d at 528; *Ruskin v. Griffiths*, 269 F.2d 827, 831 (2d Cir. 1959) (holding that the equitable rules governing contests between creditors do not apply in the context of a contest between a debtor's creditor and the debtor or its stockholders). As the First Circuit has noted,

> [w]here the debtor is solvent, the bankruptcy rule is that where there is a contractual provision, valid under state law, providing for interest on unpaid instalments of interest, the bankruptcy court will enforce the contractual provision with respect to both instalments due before and ... after the petition was filed....

Debentureholders Protective Comm. of Cont'l Inv. Corp. v. Cont'l Inv. Corp., 679 F.2d 264, 269 (1st Cir. 1982). When a debtor is solvent, then, the presumption is that a bankruptcy court's role is merely to enforce the contractual rights of the parties, and the role that equitable principles play in the allocation of competing interest is significantly reduced.

Based on this application of the absolute priority rule in solvent debtor cases, Class 4 argues that we should enforce their rights under the contract, including their right to interest awarded at the default rate as set forth in the terms of their contract. To do otherwise (i.e., to interpret the amended plan as not requiring the payment of default interest), they argue, would violate § 1129(b)'s fair and equitable standard. We agree. Default interest rates are intended to transfer some of the risk of default from creditors to the debtor. *Chicago*, 791 F.2d at 527. By interpreting the plan as allowing interest only at the non-default rate, the bankruptcy court effectively transferred that risk back to the Class 4 creditors. Despite the equitable nature of bankruptcy proceedings, the bankruptcy judge does not have "free-floating discretion to redistribute rights in accordance with his personal views of justice and fairness." *Id.* at 528. Rather, absent compelling equitable considerations, when a debtor is solvent, it is the role of the bankruptcy court to enforce the creditors' contractual rights. *See Chicago*, 791 F.2d at 528 ("[I]f the bankrupt is solvent the task for the bankruptcy court is simply to enforce creditors rights according to the tenor of the contracts that created those rights.").

Dow Corning's argument that Class 4 did not meet its burden of proving that the equities of this case require the payment of default interest is unpersuasive. Courts in solvent debtor cases have overwhelmingly concluded that there is a presumption that the default interest rate should be allowed. *See Southland Corp.*, 160 F.3d at 1059-60 ("[A] default interest rate is generally allowed, unless the higher rate would produce an inequitable result." (citations omitted)); *In re Consol. Operating Partners L.P.*, 91 B.R. 113, 116 (Bankr. D. Colo. 1988) ("When the debtor is solvent, the equities dictate that additional interest be paid to the ... creditor rather than to the debtor."); *Ruskin*, 269 F.2d at 832 (holding that when the debtor is solvent, it is "the opposite of equity to

allow the debtor to escape the expressly-bargained-for result of its act"). We conclude, like the other courts to have considered this issue, that there is a presumption that default interest should be paid to unsecured claim holders in a solvent debtor case.

The record before us is not sufficiently developed for us to determine whether the general rule calling for the payment of default interest in solvent debtor cases, when considered with other equitable factors, makes the award of default interest appropriate in this case. We therefore remand this matter to the district court, with instructions to remand it to the bankruptcy court, for proceedings consistent with this decision, including the consideration of any equitable factors affecting the interest rate. Given our decision, Dow Corning's appeal from the bankruptcy court's order awarding interest at a non-variable rate is moot.

III. FEES, COSTS AND EXPENSES

The bankruptcy court's 1999 decision confirming the amended plan awarded the Class 4 creditors all fees, costs and expenses to the extent that they are allowable under applicable law. In its 2001 decision, the bankruptcy court held that the law of this circuit, as set forth in *CPT Holdings, Inc. v. Industrial & Allied Employees Union Pension Plan, Local 73,* 162 F.3d 405 (6th Cir. 1999), does not allow Class 4 to recover attorneys' fees, costs and expenses, and thus denied such an award. Although the district court disagreed with the bankruptcy court's application of *CPT Holding*, it affirmed that court's decision. Applying *In re Martin,* 761 F.2d 1163 (6th Cir. 1985), the district court held that Class 4 is entitled only to attorneys' fees, costs and expenses to which they had a contractual right under state law, and which were incurred in enforcing the validity of the contracts in question. Because the fees, costs and expenses at issue were not incurred while litigating the validity of Class 4's contracts with Dow Corning, the district court concluded

that Class 4 is not entitled to recover those amounts. Class 4 appeals, and argues that it is entitled to attorneys' fees, costs and expenses in accordance with the terms of the pre-petition contracts.

1. Bankruptcy Code

A proof of claim filed under 11 U.S.C. § 501 is deemed an allowed claim "unless a party in interest ... objects." *See In re Welzel*, 275 F.3d 1308, 1316 (11th Cir. 2001) (citing 11 U.S.C. § 502(a)). If, as here, a party objects to a claim, § 502 requires that the bankruptcy court allow an otherwise valid claim unless one of the exceptions enumerated in subsection (b) precludes allowance. Although § 502(b)(4) excludes those attorneys' fees that exceed the reasonable value of such services, that section does not prohibit the recovery of reasonable post-petition attorneys' fees, costs and expenses.

Despite the fact that § 502 does not, on its face, prohibit the recovery of post-petition attorneys' fees, costs and expenses, Dow Corning argues that Congress intended to preclude such recovery by creditors with undersecured claims. Dow Corning points to § 506(b) of the Code, entitled "Determination of secured status," which states:

> To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement or state statute under which such claim arose.

11 U.S.C. § 506(b). That section explicitly allows the holder of an oversecured claim to recover reasonable post-petition fees, costs and expenses. *See In re Hatcher*, 208 B.R. 959, 964 (B.A.P. 10th Cir. 1997) ("Under § 506(b) ...

secured creditors are entitled to post-petition attorney's fees provided that (i) the creditor is oversecured, (ii) the fees are reasonable, and (iii) the fees are provided for in the agreement between the parties."); *In re Williams,* 183 B.R. 895, 897 (D. Kan. 1995) ("This section entitles an oversecured creditor to recover reasonable attorney's fees if the recovery is expressly provided for in the security agreement.").

Dow Corning argues that § 506(b) expressly limits the recovery of such fees to creditors whose claims are oversecured, because although Congress could have made fees available to all claimants, it did not do so. In so arguing, Dow Corning invokes the statutory construction maxim *expressio unius est exclusio alterius.* "Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *TRW Inc. v. Andrews,* 534 U.S. 19, 28 (2001) (quoting *Andrus v. Glover Const. Co.,* 446 U.S. 608, 616-17 (1980)). Thus, Dow Corning argues, because § 506(b) expressly allows only oversecured creditors to recover attorneys' fees, costs and expenses, and the Code does not similarly allow unsecured creditors to recover the charges, we should bar Class 4 from doing so here. Consistent with Dow Corning's position, several courts have concluded that the language of § 506(b) indicates Congress's intent to disallow fees, costs, and expenses to undersecured and wholly unsecured creditors. *See In re Hedged-Inv. Assocs., Inc.,* 293 B.R. 523, 526 (Bankr. D. Colo. 2003); *In re Loewen Group Int'l, Inc.,* 274 B.R. 427, 444-45 (Bankr. D. Del. 2002); *In re Smith,* 206 B.R. 113, 115 (Bankr. D. Md. 1997); *In re Woodmere Investors Ltd. P'ship, Inc.,* 178 B.R. 346, 355-56 (Bankr. S.D.N.Y. 1995); *In re Saunders,* 130 B.R. 208, 210 (Bankr. W.D. Va. 1991); *In re Sakowitz,* 110 B.R. 268, 272 (Bankr. S.D. Tex. 1989).

The courts that deny recovery of attorneys' fees, costs, and expenses to unsecured claims rely not only on the *expressio unius* rule, but they also analogize post-petition

fees, costs and expenses to post-petition interest. It is undisputed that unsecured creditors are generally prohibited from recovering post-petition interest, because claims for unmatured interest are explicitly prohibited under § 502(b). *See* 11 U.S.C. § 502(b)(2) (providing that bankruptcy courts cannot allow a claim for "unmatured interest"). Section 506(b) explicitly allows oversecured creditors to recover postpetition interests on their claims, thereby exempting them from the strictures of § 502(b) to the extent their claims are oversecured. *See* § 11 U.S.C. 506(b) ("To the extent that an allowed secured claim is secured by property the value of which ... there shall be allowed to the holder of such claim ... interest on such claim.").

In *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assoc., Ltd.*, 484 U.S. 365 (1988), a case involving an insolvent debtor, the Supreme Court considered whether an undersecured creditor who sought relief from the automatic stay was entitled to receive interest on its collateral as adequate protection. The Court reasoned that because § 506 "permits post-petition interest to be paid only out of the 'security cushion,' the undersecured creditor, who has no such cushion, falls within the general rule disallowing post-petition interest." *Id.* at 372-73 (citing 11 U.S.C. § 502(b)(2)). Although the issue of whether unsecured creditors could collect attorneys' fees, costs and expenses was not before the Court, it opined that if Congress had intended undersecured creditors to receive interest as adequate protection, "surely [§ 506] is where that disposition would have been set forth." *Id.* at 373. Relying on *Timbers*, some bankruptcy courts have denied unsecured creditors attorneys' fees, costs and expenses from insolvent debtors based upon, *inter alia*, this analogy between these charges and postpetition interest. *See, e.g., Loewen Group*, 274 B.R. at 442-43; *Woodmere*, 178 B.R. at 356.

Although persuasive, the cases cited by Dow Corning and relied on by the bankruptcy court dealt exclusively

with the recovery of attorneys' fees, costs and expenses from insolvent bankruptcy estates, a question not before us today. Although *Timbers* states that, as a general rule, undersecured creditors cannot recover interest on their collateral, the Court noted that in the "admittedly rare" case when the debtor proves solvent, both undersecured and wholly unsecured creditors can recover interest. *Timbers,* 484 U.S. at 379. If the analogy between the rights of the undersecured creditor to recover interest and that creditor's rights to recover fees, costs and expenses is apt, then Class 4 should be able to recover fees, costs and expenses from Dow Corning, a solvent debtor. We recognize that recovery of interest from solvent debtors is explicitly allowed by 11 U.S.C. § 726, and that no such similar provision explicitly allows the recovery of fees, costs and expenses. But the fact that Congress would expressly provide for the recovery of interest by unsecured creditors is not surprising. In the absence of such an explicit exception, an undersecured or wholly unsecured creditor would be unable to recover postpetition interest given § 502(b)'s general prohibition against the recovery of unmatured interest. *See* 11 U.S.C. § 502(b)(2). Because there is no such general prohibition against the recovery of attorneys' fees, costs and expenses contained in § 502(b), there is no need for an explicit statutory exception allowing recovery against solvent debtors.

Our decision is consistent with the decision by other courts that have considered whether unsecured creditors can collect attorneys' fees, costs and expenses from solvent debtors. *See In re United Merchants & Mfrs., Inc.,* 674 F.2d 134, 137 (2d Cir. 1982) ("[T]he case law does not support a distinction between secured and unsecured creditors to who seek to recover collection costs in bankruptcy."); *In re Fast,* 318 B.R. 183, 194 (Bankr. D. Colo. 2004) ("The Court is persuaded that an unsecured creditor is not, completely and unqualifiedly, precluded from asserting a claim for postpetition attorney's fees if it

is provided for by contract."); *In re New Power*, 313 B.R. 496, 510 (Bankr. N.D. Ga. 2004) ("Neither § 506(b) nor the *Timbers* decision bar unsecured creditors' from asserting a contractual or statutory claim for attorneys' fees as an unsecured claim."); *In re Carter*, 220 B.R. 411, 418 (Bankr. D.N.M. 1998) ("[I]nterest is appropriately awarded to an unsecured creditor when there is a solvent debtor and there is a surplus produced by the estate. The same is true regarding attorneys fees."); *In re Cont'l Airlines Corp.*, 110 B.R. 276, 280 (Bankr. S.D. Tex. 1989) ("[C]reditors should be entitled to the recovery of attorney fees in instances where the Debtor is solvent and they would be entitled to attorney fees under state law for litigation over the validity and amount of their claim but for the filing of the bankruptcy case."); *In re Sakowitz*, 110 B.R. at 270 ("This Court is further of the opinion that attorney fees should be allowed where the Debtor is solvent (before and after the allowance) due to policy considerations akin to those with respect to the allowance of interest post-petition.").

We therefore choose to join the body of cases holding that unsecured creditors may recover their attorneys' fees, costs and expenses from the estate of a solvent debtor where they are permitted to do so by the terms of their contract and applicable non-bankruptcy law.

2. Law of this Circuit

Having determined that nothing in the Bankruptcy Code prohibits an unsecured creditor from recovering attorneys' fees, costs and expenses from a solvent debtor, we must consider whether the law of this circuit places any limitations of the extent to which creditors may recover those reimbursements to which they are contractually entitled. The Class 4 creditors argue that *In re Martin*, 761 F.2d 1163 (6th Cir. 1985) governs this action, and allows creditors to recover attorneys' fees, costs, and expenses to the full extent of their contract. In that case, a creditor filed an adversary proceeding in an

effort to have its debt excepted from discharge during the course of chapter 7 personal bankruptcy proceedings. The bankruptcy court granted the exception from discharge, but refused to award the creditors costs. *Id.* at 1165. On appeal, we noted that the Bankruptcy Code explicitly awards attorneys' fees, costs and expenses to prevailing debtors, but makes no such specific allowance for prevailing creditors. *Id.* at 1168 (citing 11 U.S.C. § 523(d)). We held, however, that creditors remain entitled to attorneys' fees, costs and expenses if they have a contractual right to such fees valid under state law. *Id.*

In determining that Class 4 was not entitled to recover those attorneys's fees, costs and expenses, the district court rejected the bankruptcy court's reasoning that *In re Martin* governs the Class 4 creditor's recovery in this case, and instead relied on *CPT Holdings, Inc. v. Industrial & Allied Employees Union Pension Plan, Local 73,* 162 F.3d 405 (6th Cir. 1999). In *CPT Holdings*, we held that a multi-employer pension plan had no "claim" as defined by 11 U.S.C. § 101(5) for withdrawal liability until an employer actually withdraws from the plan. *Id.* at 409. Because the employer in that case withdrew from the pension plan after confirmation of the employer's reorganization plan, we held that the pension plan had no claim against the employer. *Id.* The bankruptcy court reasoned, and Dow Corning now argues, that the Class 4 creditors could not recover the requested attorneys' fees, costs and expenses, because the alleged default that triggered those fees and costs did not occur pre-petition.

Although the district court correctly rejected the bankruptcy court's rationale for denying the Class 4 creditors' request for attorneys' fees, costs and expenses, we ultimately disagree with the reasoning of both courts, because neither *In re Martin* nor *CPT Holding* governs our decision. *In re Martin* is a case concerning a dischargeability action against the debtor, as opposed to a claim against the general assets of the estate, and as such, involves an entirely different set of policy

considerations. *See In re Sakowitz*, 110 B.R. at 275 ("*In re Martin* does not hold that an unsecured proof of claim (against the estate) is entitled to include attorneys' fees if the underlying contractual provisions would so allow."). We do not read *Martin* as standing for the general proposition that unsecured creditors may recover postpetition attorney fees, costs, and expenses against the estate of an insolvent debtor if the contract from which their debts arise authorizes the recovery of these charges. Just as *In re Martin* does not control our decision today, neither does *CPT Holding*. The holding of that case clarifies the scope of the definition of claim as set forth in § 101(5). *CPT Holding* has no bearing on the allowance of attorneys' fees, costs and expenses.

Despite the fact that *CPT Holdings* does not limit the Class 4 creditor's recovery of attorneys' fees, costs, and expenses, Dow Corning argues that we should follow the line of cases that limit a creditor's recovery of attorneys' fees, costs and expenses to those incurred while litigating the validity of the contract. *See Renfrow v. Draper*, 232 F.3d 688, 694 (9th Cir. 2000) (awarding attorneys' fees in bankruptcy incurred while litigating the validity and terms of a divorce decree); *In re Fobian*, 951 F.2d 1149, 1153 (9th Cir. 1991) ("[W]here the litigated issues involve not basic contract enforcement questions, but issues peculiar to federal bankruptcy law, attorney's fees will not be awarded absent bad faith or harassment by the losing party."); *In re Coast Trading*, 744 F.2d 686, 693 (9th Cir. 1984) (holding that neither party is entitled to attorneys' fees in bankruptcy dispute because neither party seeks to enforce the contract); *Agassi v. Planet Hollywood Int'l, Inc.*, 269 B.R. 543, 553 (D. Del. 2001) (same); *In re Child World, Inc.*, 161 B.R. 349, 354 (Bankr. S.D.N.Y. 1993) (holding that creditor "is not entitled to attorneys' fees in connection with litigation of purely bankruptcy law issues"). The Class 4 creditors argue that they should be permitted to recover their post-petition attorneys' fees,

costs and expenses to the full extent allowed under controlling state law.

In *Vanston Bondholders Protective Committee v. Green*, 329 U.S. 156, 161 (1946), the Supreme Court stated: "What claims of creditors are valid and subsisting obligations against the bankrupt at the time a petition in bankruptcy is filed, is a question which, in the absence of overruling federal law, is to be determined by reference to state law." *See also Raleigh v. Ill. Dep't of Revenue*, 530 U.S. 15, 20 (2000) ("The 'basic federal rule' in bankruptcy is that state law governs the substance of claims, Congress having 'generally left the determination of property rights in the assets of a bankrupt's estate to state law.' " (citations omitted)); *Butner v. United States*, 440 U.S. 48, 55 (1979) ("Property interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding."). Although were are mindful of the "American Rule," which generally requires that all litigants pay their own fees, parties can and do override this rule via contract. *See Alyeska Pipeline Serv. Co. v. Wilderness Soc.*, 421 U.S. 240, 257 (1975) ("[T]he general rule [is] that, *absent statute or enforceable contract*, litigants pay their own attorneys' fees." (emphasis added)); *see also In re Colbert*, 185 B.R. 247, 249 (Bankr. M.D. Tenn. 1995).

Following *Vanston*, we conclude that the extent of the Class 4 creditors recovery will be governed by state law. Other Sixth Circuit cases have reached results consistent with our decision today in other bankruptcy contexts. *See Martin*, 761 F.2d at 1168 (citing *Sec. Mortgage Co. v. Powers*, 278 U.S. 149, 153-54 (1928) (relying on state law to determine whether a lien was valid in a federal bankruptcy proceeding), and *In re Bain*, 527 F.2d 681, 685 (6th Cir. 1975) (upholding a claim for fees and stating, "The validity and construction of a secured obligation to

pay attorney's fees is a question of state law," without reference to whether any state law litigation occurred in bankruptcy court)); *In re Madeline Marie Nursing Homes*, 694 F.2d 433, 438 (6th Cir. 1982) (citing *Butner* for the proposition that "[u]nless some federal interest requires a different result, there is no reason why such interest should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding," and stating "[w]e believe .. that the underlying principle of [numerous Sixth Circuit and Supreme Court] cases–that state law should generally be used to decide issues regarding property interests–applies equally to contract cases, which would be governed by state law absent the bankruptcy.").

In so holding, we decline to follow the series of Ninth Circuit cases relied upon by Dow, which limit the recovery of attorneys' fees, costs and expenses to those incurred in enforcing the contract. Significantly, in several of those cases, the contract itself only provided for the recovery of attorneys' fees in that specific context.[4] *See Renfrow*, 232 F.3d at 692 n.2; *In re Fobian*, 951 F.2d at 1153. Furthermore, in *Coast Trading*, the state law under which the parties were seeking fees granted only those fees incurred by a party prevailing "on an action to enforce a contract where the contract specifically provides for attorneys' fees to be awarded." 744 F.2d at 693 (citing Or. Rev. Stat. § 20.096). Although many of the cases cited

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[4] Dow Corning cites *In re Sokolowski*, 205 F.3d 532, 534 (2d Cir. 2000), for the proposition that a creditor cannot recover attorneys' fees unless incurred while litigating the validity of the contract. In that case, the Second Circuit considered a debtor's request for attorneys' fees despite the lack of a contractual provision entitling the debtor to such fees. Thus, that case does not provide persuasive authority as to whether the Class 4 creditors may recover the attorneys' fees to which they are contractually entitled.

by Dow Corning are distinguishable from the case at bar, we recognize that the Ninth Circuit has squarely held that, even if provided for by contractual provisions valid under state law, creditors may never be awarded attorneys' fees expended litigating issues solely of federal bankruptcy law. *See Thrifty Oil Co. v. Bank of Am.*, 322 F.3d 1039, 1040-42 (9th Cir. 2003); *In re Baroff*, 105 F.3d 439, 440-42 (9th Cir. 1997). Relying on its previous cases, the Ninth Circuit held in *Thrifty Oil* that the prevailing party could not recover attorneys' fees because neither the validity nor enforceability of the contract was at issue. *Thrifty Oil*, 322 F.3d at 1041-42.

We do not find the reasoning of *Thrifty Oil* persuasive. In reaching its conclusion, the Ninth Circuit considered *In re Baroff*, in which that court determined that California law limits the recovery of attorneys' fees to "any action on a contract." 105 F.3d at 442-43. Similarly, in *In re Hashemi*, 104 F.3d 1122, 1126 (9th Cir. 1996), also relied upon by the *Thrifty Oil* court, the contractual provision at issue only provided for "fees incurred in enforcing its rights under the contract," and where the same California Code provision limiting the recovery of attorneys' fees to litigation involving action on the contract applied. Like *Thrifty Oil*, other cases that squarely hold that attorneys' fees are only recoverable if incurred in enforcing the underlying contract reach that conclusion based on their interpretation either of caselaw or contractual provisions that limit the recovery of fees to this narrow situation—litigation over contract enforceability. *See In re Sokolowski*, 205 F.3d 532, 535 (2d Cir. 2000) (citing *In re Fobian*, 951 F.2d at 1153); *Agassi*, 269 B.R. at 552 (citing *In re Fobian*, 951 F.2d at 1153, and *In re Sokolowski*, 205 F.3d at 535); *Child World, Inc.*, 161 B.R. at 354-55 (citing *In re Fobian*, 951 F.2d at 1153); *In re Best Prod. Co., Inc.*, 148 B.R. 413, 414 (Bankr. S.D.N.Y. 1992) (citing *In re Fobian*, 951 F.2d at 1153).

In this circuit, an unsecured creditor may recover those costs to which it has a state-law-based right against

a solvent debtor, regardless of the nature of the federal proceedings. State law may, of course, require an examination of the nature of the proceedings in federal court, but absent such state law concerns, the federal law of this circuit does not limit contractual awards of attorneys' fees to situations where the issue of contract enforceability was litigated in bankruptcy court.[4] Although arguably in tension with the Ninth Circuit, our decision is consistent with that of other courts that have awarded attorneys' fees to which a party was contractually entitled, despite the fact that the litigation did not involve enforcement of the contract itself. *See TransSouth Fin. Corp. of Florida v. Johnson*, 931 F.2d 1505, 1506-07 (11th Cir. 1991) (allowing a creditor successful in dischargeability proceedings to recover contractual attorneys' fees); *United Merchants & Mfrs.*, 674 F.2d at 139 (rejecting bankruptcy court's decision limiting creditor's recovery of collection costs to those incurred for services outside bankruptcy proceedings).

In the instant case, none of the applicable state law is before us, nor has any party or any court yet undertaken a detailed examination of the contracts at issue. Thus, we reverse the district court's determination that attorneys' fees, costs, and expenses are never allowable unless they relate to litigation of the validity of contracts under state law, and remand this case to the district court, with instructions to remand it to the bankruptcy court, for proper consideration of exactly what fee arrangements are permitted under the relevant state laws and under each contract at issue. It may well be that the relevant laws do indeed, like the California law at issue in *Baroff*, only permit fees related to contract enforcement as

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[4] Bankruptcy courts remain free, of course, to limit recovery to those attorneys' fees, costs and expenses which are *reasonable* under the circumstances.

opposed to those incurred in any type of debt collection action, but this is simply not clear on the record before us.

IV. CONCLUSION

For the foregoing reasons, we hereby **REVERSE** the decision of the district court, **REMAND** the case to the district court, and instruct that the district court remand this matter to the bankruptcy court for proceedings consistent with this opinion.

FILED

OCT 31 2006

LEONARD GREEN, Clerk

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Nos. 04-1608, 04-1643, 04-1720, 04-1721, 04-1722.

In re: DOW CORNING CORPORATION, Debtor.

Official Committee of Unsecured Creditors, et al., Appellants/Cross-Appellees,

v.

Dow Corning Corporation, Appellee/Cross-Appellant,

Dow Chemical Corporation and Corning Incorporated, Appellees.

ORDER

BEFORE: MOORE and COLE, Circuit Judges; and WISEMAN,* District Judge.

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc,

* Hon. Thomas A. Wiseman, Jr., Senior United States District Judge for the Middle District of Tennessee, sitting by designation.

the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/

Leonard Green, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT MICHIGAN
SOUTHERN DIVISION

In Re: DOW CORNING CORPORATION, Debtor.

Case No. 01-CV-71843-DT
HON. DENISE PAGE HOOD

MEMORANDUM OPINION AND ORDER

I. BACKGROUND

The Official Committee of Unsecured Creditors ("Unsecured" or "Commercial" Committee or "Class 4" Claimants/Creditors), originally filed an objection to the Amended Joint Plan of Reorganization ("Amended Joint Plan") filed by the Debtor, Dow Corning, Corporation and the Official Committee of Tort Claimants under § 1129(a)(7) because of the Case Interest Rate issue. The Amended Joint Plan provided that Class 4 Creditors would be paid pendency interest at the federal judgment rate pursuant to 28 U.S.C. § 1961 in effect on the Petition Date (6.28%), compounded annually on each anniversary of the Petition Date. (Amended Plan, § 1.24) The Plan also proposed to pay "such fees, costs and expenses (including prepayment penalties or liquidated damages), but only to the extent ... [a]llowable under applicable law." (Amended Plan, § 5.1)

Prior to the confirmation of the Amended Joint Plan, the Bankruptcy Court and this Court heard arguments on the Class 4 Objections on April 15, 1999. On July 30, 1999, the Bankruptcy Court issued an amended opinion denying the Class 4 Objections. *In re Dow Corning Corp.*, 237 B.R. 380 (Bankr. E.D. Mich. 1999). The Bankruptcy

Court overruled the Class 4 Objections and held that the Case Interest Rate should not be a variable rate but a fixed Case Interest Rate, in this case, the federal judgment rate, and that the fixed Case Interest Rate satisfied the confirmation requirements of § 1129(a)(7). *Id.* at 412. No appeal was taken to the July 30, 1999 Opinion.

During the Confirmation process, the Class 4 Creditors, a rejecting class, filed confirmation objections to the Plan claiming that the Case Interest Rate was inadequate, basing their arguments on the "fair and equitable" standard applicable to rejecting classes under 11 U.S.C. § 1129(a). In its July 30, 1999 Opinion, the Bankruptcy Court had decided that the Case Interest Rate could be a fixed rate. The Bankruptcy Court in the Confirmation process was called upon to determine which fixed rate would be fair and equitable under 11 U.S.C. § 1129(a) to Class 4 Creditors, the federal judgment rate or a contract rate. A Confirmation Hearing was held on the matter.

On December 1, 2000, the Bankruptcy Court issued an opinion regarding the Class 4 Confirmation Objections. *In re Dow Corning Corp.*, 244 B.R. 678 (Bankr. E.D. Mich. 1999). The Bankruptcy Court concluded that "the Plan provision [i.e., the Case Interest Rate as defined in the Plan] fixing the pendency interest at that which applies to federal judgments was not 'fair and equitable.'" *Id.* at 696. During the Confirmation hearing, the Bankruptcy Court noted that the Debtor's counsel stated that the Plan "proponents have agreed that the Plan will pay whatever we have to pay once the courts have determined" the interest rate that a solvent debtor must pay to unsecured creditors during the pendency of the bankruptcy case. (June 28, 1999 Hrg. Tr. at 31) The Bankruptcy Court thereafter confirmed the Plan and determined that, based on the remarks of the Debtor's counsel, the Plan had been amended "to provide that pendency interest will be paid to Class 4 creditors in accordance with the terms of their

contracts." *In re Dow Corning Corporation*, 244 B.R. at 696. No one appealed this ruling.

The Class 4 Claimants and the Debtor thereafter agreed to a procedure by which the Bankruptcy Court's two Opinions and the modified Plan would be applied to Class 4 Claims. (*See* Stipulation Establishing Procedures for Certain Common issue Objections to Class 4 Claims; Docket No. 24765). The Debtor filed Objections to all Class 4 Claims to the extent they asserted entitlement to pendency interest at a contractual default rate, post petition fees, costs, and expenses. The Debtor objected to any pendency interest rate, other than the base, non-default rate, if any, stated in the contract.[1] The Appellants filed motions for summary judgment in opposition to the Debtor's Objections claiming that they were entitled to recover default rates that varied from the base contract rate. A hearing was held on the matter on April 19, 2001. The Bankruptcy Court ruled on the record denying the Appellants' motions. The Bankruptcy Court issued its Order denying the Motions on May 3, 2001.

The Appellants filed two appeals regarding the matter. The first appeal was filed after the oral ruling on April 19, 2001 but before the May 3, 2001 Order denying the Motions. The second appeal was filed after the May 3, 2001 Order was issued. The Debtor filed a Motion to Dismiss the appeals and oral arguments were held on the Motion to Dismiss on August 7, 2001. The Court dismissed the first appeal as premature but denied the Motion to Dismiss as to the second appeal and set the matter for hearing. (See March 29, 2002 Memorandum Opinion and Order)

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[1] There is no dispute that if there is no interest rate expressly stated in a contract, the federal judgment rate applies, pursuant to Section 1.24 of the Amended Plan.

It is noted that at the hearing on the Motion to Dismiss, the parties agreed that briefing on the merits of the case would proceed pending the Court's decision on the Motion to Dismiss pursuant to a July 11, 2001 Stipulated Order regarding the briefing schedule entered by the Court. The Appellants' brief was filed on July 31, 2001, the Appellee's response brief was filed on August 28, 2001 and the Appellants' reply brief was filed on September 17, 2001. The Appellants appear to be under the impression that the merits of the case have not been fully briefed, whereas the Debtor has indicated that it believes the merits have been fully briefed. Based on the briefs submitted by the parties, the Court finds the merits of this appeal have been fully addressed.

There is no dispute that in a *solvent* debtor case, a debtor is required to pay unsecured creditors post petition interest. There is no dispute that the Debtor is solvent with the estimated equity value in the range of $1.2 to $1.9 billion.

The Appellants essentially make two arguments on appeal. The first is that the Debtor must pay Class 4 Creditors the full amount of pendency interest called for by their pre petition contracts. Specifically, the Appellants claim that the Debtor must pay the default interest and compound the amounts in accordance with their contracts. The Appellants claim that the Bankruptcy Court's April 19, 2001 oral ruling, incorporated by reference in its May 3, 2001 Order, is in error because it violates the fair and equitable standard codified in Section 1129(b)(1) of the Code and is in contravention of the Bankruptcy Court's previous opinion on whether the rate was fair and equitable. The Appellants' second argument is that they are entitled to recover attorney fees, costs and expenses pursuant to the terms of the pre petition contracts with the Debtor. They argue that the Bankruptcy Court's ruling denying Class 4 Creditors their fees, costs and expenses conflicts with applicable authorities.

In response, the Debtor argues that the Bankruptcy Court's May 3, 2001 Order is not contrary to its previous Opinions and that the Bankruptcy Court did not err in denying the Appellants' fees and costs.

II. STANDARD OF REVIEW

Generally, a bankruptcy court's grant of summary judgment is reviewed *de novo. Bauer v. Montgomery,* 215 F.3d 656, 659 (6th Cir. 2000); *Johnson v. Hills & Dales Gen. Hosp.,* 40 F.3d 837, 839 (6th Cir. 1994); *Deaton v. Montgomery County,* 989 F.2d 885 (6th Cir. 1993). The district court has jurisdiction over appeals from final orders of the bankruptcy court in core proceedings. 28 U.S.C. §§ 157(b)(1) and 158(a)(1). The confirmation of a plan is a core proceeding. 28 U.S.C. § 157(b)(2)(L). A bankruptcy court's findings of fact are reviewed under a clearly erroneous standard, while its conclusions of law are reviewed *de novo. Mapother & Mapother, P.S.C. v. Cooper (In re Downs),* 103 F.3d 472, 476-77 (6th Cir. 1996); Bankr. R. 8013. Where a bankruptcy court's determination involves a mixed question of fact and law, the district court "must break it down into its constituent parts and apply the appropriate standard of review for each part." *Wesbanco Bank Barnesville v. Rafoth (In re Baker & Getty Fin. Servs., Inc.),* 106 F.3d 1255, 1259 (6th Cir. 1997)(quoting *Investors Credit Corp. v. Batie (In re Batie),* 995 F.2d 85, 88 (6th Cir. 1993)).

The Debtor claims that the standard of review to be applied in this appeal is abuse of discretion because the Bankruptcy Court's denial of the Appellants' Motions with respect to the pendency interest was an interpretation of the provisions of the Amended Joint Plan, citing *In re Terex Corp.,* 984 F.2d 170, 172 (6th Cir. 1993). The *In re Terex* case stands for the proposition that the standard of review depends on the actions taken by the bankruptcy court. The Sixth Circuit stated, "[w]e conclude that although the bankruptcy court referred to explicit provisions of the Bankruptcy Code, it did not rely

on or interpret the Bankruptcy Code. Its ruling, therefore, cannot be said to constitute a legal conclusion subject to *de novo* review. Rather, we believe that the bankruptcy court interpreted the Plan, and then exercised its equitable powers to breathe life into the provisions of the Plan. Accordingly, we review the interpretation of the Plan with full deference." *Id.* (citations omitted) If the bankruptcy court did not rely on the Bankruptcy Code language in interpreting the provisions of a plan, then the more deferential abuse of discretion standard applies. *Id.* A review of the Bankruptcy Court's oral ruling on April 19, 2001 shows that its decision was not based on the Bankruptcy Code language, therefore, the abuse of discretion standard applies in this case.

III. ANALYSIS

A. Pendency Interest Rate

1. Bankruptcy Court Opinion

The Amended Joint Plan provided for payment of post petition interest to the commercial creditors at the "Federal judgment rate provided in 28 U.S.C. § 1961 in effect on the Petition Date" which was at 6.28%. The Bankruptcy Court in its December 1, 2000 Opinion concluded that the Plan provision fixing the pendency interest rate at the federal judgment rate was *not* "fair and equitable." *In re Dow Corning Corp.*, 244 B.R. at 696. No party disputes that at the confirmation hearing, the Debtor's counsel stated that the "proponents have agreed that the Plan will pay whatever we have to pay once the courts have determined" the interest rate to be paid by a solvent debtor to unsecured creditors as pendency interest. (June 28, 1999, Tr. at 31) The Bankruptcy Court, based on these remarks considered the Plan verbally amended "to provide that pendency interest will be paid to Class 4 creditors in accordance with the terms of their contracts." *Id.* Pendency interest was specifically defined as interest that accrues "for the time frame beginning with the commencement of this case and

ending on the effective date of the Plan." *Id.* at 680. In an oral opinion on April 19, 2001, the Bankruptcy Court determined that the Plan limited the recovery of pendency interest to rates in effect as of May 15, 1995, the date of the Debtor's Petition, compounded annually. (Apr. 19, 2001 Tr., at 78-85). The issue of the contract pendency interest rate arose again.

After reviewing the briefs and hearing oral arguments, the Bankruptcy Court rendered its oral opinion in April 2001 and noting the verbal amendment to the Plan opined that in determining the applicable contract rate under the terms of the Plan, "it would presumably be the rate in effect on May 15, 1995, the date Dow Corning's bankruptcy case commenced." (Apr. 19, 2001 Tr., at 81) The Bankruptcy Court also noted that the Debtor was not in default with respect to any of the loans at issue before the court on that date. The Bankruptcy Court went on to state that "a straightforward application of the plan terms would mean that the creditors are entitled only to the base contract rate of interest" and were precluded from seeking a higher rate by Section 1141(a) of the Code, *citing Adair v. Sherman*, 230 F.3d 890, 894 (7th Cir. 2000). (Apr. 19, 2001 Tr., at 81) Citing *In re Terex*, the Bankruptcy Court stated that "interest on a claim which is allowed post-confirmation can be awarded only if doing so is not inconsistent with the terms of the plan." (Apr. 19, 2001 Tr., at 83) The Bankruptcy Court concluded that the Appellants were seeking to modify the plan and as such were required to show: the award of default interest was consistent with the Plan; or if inconsistent, that the default interest requested was appropriate "because the requirements for post confirmation plan modification set forth in Section 1127 of the Code have been met or are for some reason inapplicable." (Apr. 19, 2001 Tr. at 85) The Bankruptcy Court then ruled that the motion for summary judgment was denied "insofar as creditors ask for some kind of generic declaration that they are entitled to default

interest" because the creditors had not shown that default interest was not a modification of the Plan or that the requirements for modification of the Plan had been met. (Apr. 19, 2001 Tr., at 85)

The Bankruptcy Court then addressed the issue of compound interest, indicating that the Appellants' argument was that their contracts should be fully enforced and that the Debtor had argued that compounding of interest under the individual contracts would be unfair. Without addressing these arguments, the Bankruptcy Court noted that the Appellants based their right to compound interest under their contracts "solely on the Debtor's failure to make timely post petition payments." (Apr. 19, 2001 Tr, at 86) The Bankruptcy Court reasoned this would mean that the creditors' allowed claims would include interest that accrued post petition, interest not yet due and payable on the date of the petition. The Bankruptcy Court indicated that Section 502(b) of the Code does not permit an allowed claim for unmatured interest, which includes interest accruing post petition, citing *United Savings Assoc. of Texas v. Timbers of Inwood Forest Assoc.*, 484 U.S. 365, 373 (1988), *In re Terex*, 894, F.2d at 173, 4 Collier on Bankruptcy at 502-27 Note 30, 15th Edition Revised 2000, and Senate Reports No. 989, 95th Congress, 2d Session Page 62, 1978. The Bankruptcy Court further reiterated there was no tension between Section 502(b) and the rule that a solvent debtor must pay creditors post petition interest, citing its own prior opinion, *In re Dow Corning*, 244 B.R. at 685, and stating, "pendency interest whether based on Section 726(a)(5) or 1129(b)'s requirement that the plan be "fair and equitable" does not constitute an allowed claim. Thus, the proposition that such interest must be paid is compatible with Section 502(b)(2)." (Apr. 19, 2001 Tr., at 86)

Addressing the "general fairness" issue, the Bankruptcy Court stated that a compound interest provision already existed in the Plan at Section 1.24

allowing interest to be compounded annually on the anniversary date of the petition, which the Bankruptcy Court found precluded compounding at some "other interval." (Apr. 19, 2001 Tr. at 87) In its December 1999 Opinion on the pendency interest, the Bankruptcy Court did not address the compounding of interest issue.

2. Commercial Committee's Arguments

On appeal, the Appellants assert that the Bankruptcy Court rewrote the Plan by its April 2001 decision, and that such rewriting is not fair and equitable. The Committee argues that under Section 1129(b) the Debtor is obligated to pay creditors in accordance with their contracts. The Committee, citing the Bankruptcy Court's decision, 244 B.R. at 689-690, maintains that the "fair and equitable" standard requires that the Debtor recognize the creditor's right to interest at contractual rates before retaining any equity. The Committee noted that the Debtor is solvent by a margin nearing $2 billion and is certainly able to pay its debts.

The Committee cites a number of cases requiring payment of default rates of pendency interest including: *In re Southland*, 160 F.3d 1054, 1059-60 (6th Cir. 1998); *Ruskin v. Griffiths*, 269 F.3d 827, 831-32 (2d Cir. 1959); *In re Dixon*, 228 B.R. 166, 171-76 (W.D. Va. 1998); *In re Route One W. Windsor Ltd. P'ship*, 225 B.R. 76, 89-90 (Bankr. D.N.J. 1998); *In re Sugarcreek Window & Door Corp.*, No. 95-60810, 1996 WL 374116, at *3 (N.D. Ohio June 13, 1996); *Invex Holdings, N.V. v. Equitable Life Ins.*, 179 B.R. 111, 115 (N.D. Ind. 1993), *aff'd sub nom., In re Terry Ltd. P'ship*, 27 F.3d 241 (7th Cir. 1994); and, *In re Scarborough*, No. 91-41032-COL, 1992 WL 672983, at *4 (Bankr. M.D. Ga. Dec. 31, 1992). The Committee argues that even cases cited by the Debtor favor enforcement of default interest rates where the debtor is solvent. *In re Maywood, Inc.*, 210 B.R. 91, 93 (Bankr. N.D. Texas 1997); *In re Kalian*, 178 B.R. 308, 314 nn.15-16 (Bankr. D.R.I. 1995).

With respect to the issue of compounding of interest the Commercial Committee cites two cases in support of its position that creditors are entitled to such interest under the terms of their contracts in cases where the debtor is reorganizing. *Debentureholders Protective Comm. of Cont'l Inv. Corp. v. Continental Inv. Corp.*, 679 F.2d 264, 269-70; *In re Marfin Ready Mix Corp.*, 220 B.R. 148, 158-65 (Bankr. E.D.N.Y. 1998).

The Commercial Committee also addressed the "ipso facto" caveat of the Bankruptcy Court's 1999 Fair and Equitable Opinion. Directing that the Debtor pay pendency interest in accordance with the creditors' contracts, the Bankruptcy Court wrote that in determining the applicable rate, "no effect is to be given to contractual provisions which purport to define as a default the filing of a voluntary petition for bankruptcy relief." *In re Dow Corning,* 244 B.R. at 696. The Committee argues that the Bankruptcy Code does not shield a debtor from defaulting on its contractual obligations, citing *AM-Haul Caring, Inc. v. Contractors Cas. & Sur. Co.*, 33 F. Supp. 2d 235, 241-43 (S.D.N.Y. 1998) and *In re Manville Forest Prods. Corp.*, 60 B.R. 403, 404 (S.D.N.Y. 1986). The Committee claims that "ipso facto" clauses are provisions of a contract that trigger default based solely on the "borrower's invocation of the benefits and burdens of protection under the Bankruptcy Code by the filing of a petition for relief," citing *In re Chateaugay Corp.*, No. 92 CIV. 7054, 1993 WL 159969, at *5 (S.D.N.Y. May 10, 1993) and *In re Nemko, Inc.*, 163 B.R. 927, 938 n.5 (Bankr. E.D.N.Y. 1994) (an "ipso facto" clause is an option to terminate a contract based solely on bankruptcy, insolvency or other financial condition of the debtor). The Commercial Committee argues that such clauses, sometimes called bankruptcy clauses, permit a party to terminate a contract or lease in the event of bankruptcy. *In re Nemko,* 163 B.R. at 938 n.5. The Committee argues that the Debtor's argument in this regard is a "red herring" as clauses triggering defaults or

increased rates of interest as a result of non payment or for reasons other than a debtor's bankruptcy are not considered "ipso facto" clauses. The Committee claims that the default and compounded interest clauses are triggered by non payment, not because of any "ipso facto" contract provisions.

3. Debtor's Arguments

The Debtor essentially adopts the April 2001 oral opinion of the Bankruptcy Court, arguing that the prior opinions of the Court on the issue of interest can and should be harmonized. The Debtor characterizes the ruling as a "practical interpretation of the Plan" and not an abuse of discretion. As such, the May 2001 Order of the Bankruptcy Court should be affirmed.

The Debtor then turns to alternative grounds for affirmance. The Debtor asserts that the Appellants presented no evidence to support summary judgment on their position that their claim for pendency interest at the default rates is "fair and equitable" under 11 U.S.C. § 1129(b)(1). The Debtor claims that application of the "fair and equitable" standard is fact specific and requires balancing "equitable factors and considerations, defying resolution as a matter of law." *In re D&F Const., Inc.*, 865 F.2d 673, 675 (5th Cir. 1989). When determining if a default interest rate should apply to creditors' claims, the specific facts of each case must be examined for the court to decide whether the circumstances warrant application of the higher rate. *In re Casa Blanca Project Lenders, L.P.*, 196 B.R. 140, 143 (B.A.P. 9th Cir. 1996); *In re TMA Assocs. Ltd.*, 160 B.R. 172, 175 (D. Colo. 1993).

The Debtor cites numerous cases where courts have denied the application of default interest rates and argues that no case cited by the Appellants holds that creditors in a bankruptcy have an absolute or automatic right to the default rate because their contract so provides. *In re Bohling*, 222 B.R. 340, 343 (Bankr. D. Neb. 1998); *In re Maywood, Inc.*, 210 B.R. 91, 93 (Bankr. N.D. Tex. 1997);

In re Kalian, 178 B.R. at 316-17; *In re Boardwalk Partners,* 171 B.R. 87, 92-93 (Bankr. D. Ariz. 1994); *In re Consol. Prop. Ltd. P'ship,* 152 B.R. 452, 457-58 (Bankr. N.D. Ohio 1993); *In re Timberline Prop. Dev., Inc.,* 136 B.R. 382, 386-87 (Bankr. D. N.J. 1992); *In re Hollstrom,* 133 B.R. 535, 539-41 (Bankr. D. Colo. 1991); *In re DWS Inv., Inc.,* 121 B.R. 845, 850 (Bankr. C.D. Cal. 1990); *In re White,* 88 B.R. 498, 511 (Bankr. D. Mass. 1988).

The Debtor argues that instead, the courts have carefully balanced the equities to determine whether default interest rates are fair and equitable, citing *In re Southland,* 160 F.3d 1054, 1059-60 (5th Cir. 1998); *Ruskin v. Griffiths,* 269 F.3d 827, 831-32 (2d Cir. 1959); *In re Dixon,* 228 B.R. 166, 171-76 (W.D. Va. 1998); *In re Sugarcreek,* 1996 WL 374116 at 3; *Invex Holdings,* 179 B.R. at 115; *In re Route One West Windsor Ltd. P'ship,* 225 B.R. 76, 89-90 (Bankr. D. N.J. [1998]); *Bohling,* 222 B.R. at 343; *Maywood, Inc.,* 210 B.R. at 93; *Kalian,* 178 B.R. at 313; *Boardwalk Partners,* 171 B.R. at 92-93; *Consol. Prop.,* 152 B.R. at 457-58; *Timberline,* 136 B.R. at 386-87; *Hollstrom,* 133 B.R. at 539-41; *DWS,* 121 B.R. at 850; *White,* 88 B.R. at 511; *In re Sheppley & Co.,* 61 B.R. 271, 278-79 (Bankr. N.D. Iowa 1986).

The Debtor lists six factors to be considered when making this determination: 1) whether the debtor was in default when the bankruptcy began; 2) whether there was a realistic risk of nonpayment either before or during the bankruptcy case; 3) whether the increased default rate of interest is related to a creditor's actual losses or market rates of interest; 4) whether there was an increased risk to the creditor following default; 5) whether default interest would confer a windfall upon the creditor; and, 6) the difference between the non-default rate and the default rate. (Appellee's Br., p. 13)

The Debtor goes on to say that the Appellants have presented no evidence, as is their burden, to support summary judgment on this issue. In addition the Debtor

argues that many of the cases cited by Appellants involve a default by the debtor before or immediately after the filing of the bankruptcy petition. *E.g., Southland,* 160 F.3d at 1056; *Dixon,* 228 B.R. at 169; *Sugarcreek,* 1996 WL 374116 at *1; *Invex,* 179 B.R. at 112; *Route One,* 225 B.R. at 78-79. Here, the Debtor argues there has been no pre petition default nor any risk of non payment, supporting the claim for default interest rates which are often agreed to for the purpose of compensating for enhanced risks.

The Debtor also claims that Appellants have failed to demonstrate that the default interest rates compensate the creditors for actual los[s]es as required by some of the case law. *In re DWS,* 121 B.R. at 850. The Debtor asserts that some of the default interest rates are excessive and fairness and equity prevent the application of these rates absent a showing justifying such heightened rates. The Debtor claims that recovery of pendency interest at default rates is not "inherently" "fair and equitable" as a matter of law, but that courts have required evidence of the need for interest at the default rate to cover actual losses. *In re Hassen Imports P'ship,* 256 B.R. 916, 924 (B.A.P. 9th Cir. 2000); *Casa Blanca,* 196 B.R. at 146; *In re Dixon,* 228 B.R. at 175-76; *Hollstrom,* 133 B.R. 539-40; *Kalian,* 178 B.R. at 312.

Finally, the Debtor claims that courts often compare the contract rate with the default rate to decide whether the default rate is fair and equitable. In cases where the difference between the two rates is significant the default rate has not been found to be "fair and equitable." *Boardwalk Partners,* 171 B.R. at 92; *In re Boulders on the River, Inc.,* 169 B.R. 969, 975 (Bankr. D. Or. 1994); *Timberline,* 136 B.R. at 386; *DWS,* 121 B.R. at 849. The Debtor claims that in at least one of the Appellants' claims (the subject of Objection No. 100), the default rate is almost three times that of the Case Interest Rate.

At the hearing, the Debtor cited *In re Cardelucci*, 2002 U.S. App. LEXIS 6770 (9th Cir. Apr. 12, 2002)(No. 00-56541), to support its position that equity applies in the court's determination of whether to allow post petition interest and that using one rate promotes uniformity within federal law.

4. Findings

This Court finds that the decision of the Bankruptcy Court is affirmed. There is no dispute that the Bankruptcy Court in its December 1999 opinion ruled that the Amended Joint Plan was further amended to provide that the Class 4 commercial creditors would be paid pendency interest "in accordance with the terms of the parties' contracts." *In re Dow Corning*, 244 B.R. at 696. There is no dispute that the Bankruptcy Court ruled this way after finding that the Plan provision which fixed the pendency interest rate at the federal judgment rate was not "fair and equitable." *Id.* The Bankruptcy Court had also defined "pendency interest" as interest accruing "for the time frame beginning with the commencement of this case and ending on the effective of the Plan." *Id.* at 680. Compounding of interest was not addressed by the Bankruptcy Court in that opinion. Compounding of interest is addressed in Section 1.24 of the Plan. There is no dispute that no party appealed this ruling or the basis on which the Bankruptcy Court made its ruling. All then that was left was for the court to determine the appropriate rate, which the parties agreed could be accomplished by motions before the Bankruptcy Court.

The Court finds that the Bankruptcy Court did not abuse its discretion in determining that the verbal amendment to the Plan presumed that the contract rate to be applied was the base contract rate (in accordance with the terms of the parties' contracts) applicable on the day the Petition for bankruptcy was filed by the Debtor. The Court's definition of pendency interest supports that conclusion. Pendency interest begins with the

commencement of the case. At that time all parties appear to agree that the Debtor was not in default and therefore the default rate was not in effect. If however, the parties are inaccurate and any contract was in default pre petition, then of course, the default rate would apply since it was the rate in effect on the day the bankruptcy was commenced.

The parties cite numerous cases in support of their respective arguments that the default rate does or does not apply. These cases generally apply § 506(b) of the Bankruptcy Code. 11 U.S.C. § 506(b). Section 506(b) expressly allows post petition interest to oversecured creditors. In the Bankruptcy Court's December 1999 decision the court noted that § 506(b) carves out an exception to the general rule disallowing of post petition interest in § 502(b)(2). However, the Bankruptcy Court did not find that pendency interest was available to the Appellants in this case under § 506(b), but under the provisions of § 1129(b), the payment of pendency interest at the federal judgment rate, which the Bankruptcy Court found was not "fair and equitable." There is no need in this appeal to revisit that analysis (since there was no appeal) except to indicate that § 506(b) was viewed as allowing post petition interest as an "allowed claim." Some of the considerations of a court reviewing creditors' requests for default interest rates under § 506(b) are just not applicable here, such as concerns that unsecured creditors would suffer if default interest rates were allowed to oversecured creditors. *In re Bohling*, 222 B.R. at 343; *In re Maywood*, 210 B.R. at 93. While it is true that some courts favor the application of default interest where the debtor is solvent, that is only one of the considerations taken into account by the courts. It must also be noted that many of these cases also involve the award of default interest in circumstances where there was pre petition default.

In addition, these cases do not involve a blanket decision that a default rate is available to all creditors in

a given bankruptcy. Even if the court were to apply the § 506(b) balancing of equities to determine if default rates should apply it would have to be done on a case by case basis. The Motion for Summary Judgment filed by the Appellants presented no such evidence to the Bankruptcy Court on which it could rely as a matter of law. The Bankruptcy Court did not abuse its discretion in denying the Appellants' summary judgment motions.

The pendency interest rate to be applied to the Class 4 Creditor's individual claims is the base contract rate in effect between the parties at the time the Petition was filed, and not the default rate, unless the individual claimant can show that the Debtor defaulted pre petition. The interest is to be compounded annually according to Section 1.24 of the Plan.

B. Attorney Fees, Costs and Expenses

Appellants argue that they are entitled to recover attorney fees, costs and expenses pursuant to the terms of their pre petition contracts with the Debtor. In response, the Debtor argues that the creditors are not entitled to post petition attorney fees, costs and expenses.

The Plan provides that Class 4 claims shall include fees, costs and expenses to the extent they are allowable under applicable law. (Plan, § 5.1) In its April 19, 2001 ruling on the record, the Bankruptcy Court denied the Appellant's various summary judgment motions on the issues of fees and costs finding that the unsecured creditors held no pre petition claim for costs because the breach giving rise to a right of reimbursement occurred post petition, citing *CPT Holdings, Inc. v. Industrial & Allied Employees Union Pension Plan, Local 73,* 162 F.3d 405 (6th Cir. 1999). (4/19/01 Tr. at 95) The Court affirms the Bankruptcy Court's ultimate decision denying the Appellants' summary judgment motions on this issue, but does not agree with the basis for the Bankruptcy Court's reliance on *CPT Holdings. CPT Holdings* is inapplicable because it did not involve the issue of attorney fees. For

the reasons set forth below, the Court holds that *In re Martin*, 761 F.2d 1163 (6th Cir. 1985) applies but not to the extent the Appellants argue.

In *In re Martin*, in the context of analyzing whether a debtor is entitled to attorney fees under 11 U.S.C. § 523(d), the Sixth Circuit noted that, "creditors are entitled to recover attorney's fees in bankruptcy claims if they have a contractual right to them valid under state law ..." *Id.* at 1168. The Sixth Circuit found that the creditor was entitled to costs and attorney fees necessary to collect the note if the note so provides. *Id.* Because the applicable state law enforced such a contractual obligation for reasonable attorney fees, the Sixth Circuit found that the creditor was entitled to reasonable attorney fees for the collection of the note. *Id.*

Based on *In re Martin*, this Court finds that if a contract term provides for attorney fees, a creditor in bankruptcy is entitled to recover such fees and costs, if the applicable state law enforces such a provision. The Sixth Circuit specifically noted that the note itself provided that the debtor would reimburse the creditor for the attorney fees "necessary to collect the note." *Id.* The Sixth Circuit did not expressly hold that in *all* cases where the contractual provision provides for attorney fees the creditor is automatically entitled to post petition attorney fees. The Sixth Circuit only held that the creditor was entitled to attorney fees if such fees were incurred in the enforcement of a contract. Attorney fees are not independently recoverable under the Bankruptcy Code, but they may be recovered in bankruptcy proceedings under state law if the parties' contractual arrangement so provides. *See, In re Sokolowski*, 205 F.3d 532, 535 (2d Cir. 2000).

The note at issue in *In re Martin*, was unsecured and would have been discharged in the course of the chapter 7 personal bankruptcy proceedings. *In re Martin*, 761 F.2d at 1165. The creditor filed an adversary proceeding to

have its debt determined to be excepted from discharge under 11 U.S.C. § 523(a)(2)(B). *Id.* The bankruptcy court granted the exception from discharge, which meant that the debt was not dischargeable and the debtor in bankruptcy was obligated on the note. 11 U.S.C. § 523(a); *In re Martin*, 761 F.2d at 1167. The Sixth Circuit's ruling in *In re Martin* allowed the claim for attorney fees because the creditor incurred expenses in litigating the issue of the dischargeability of the note. The prevailing creditor incurred expenses in litigating the issue and in its attempt to collect on the note. *Id.*; *see Agassi v. Planet Hollywood Int'l, Inc.*, 269 B.R. 543, 552 (D. Del. 2001) (Even if a contract provides for attorney fees, where the litigated issues involve no basic contract enforcement questions, but issues peculiar to federal bankruptcy law, attorney fees will not be awarded).

Cases interpreting attorney fees under 11 U.S.C. § 365 have relied on the "American Rule" that unless otherwise specified in a contract or statute, parties to the litigation must bear their own attorney fees. *See In re Westside Print Works, Inc.*, 180 B.R. 557, 564 (1995). However, entitlement to attorney fees is dependent on the terms of a lease and on state law because § 365(b)(1)(B) does not create an independent right to an award of attorney fees. *See In re Mid American Oil, Inc.*, 255 B.R. 839, 841 (M.D. Tenn. 2000). The issue of whether a party is in default to trigger the attorney fee provision in a contract requires interpretation of a particular contract since the cardinal rule for interpretation of a contract is to ascertain the intention of the parties from the contract. *Id.*; *In re Shangra-La, Inc.*, 167 F.3d 843, 852 (4th Cir. 1999)(The bankruptcy court erred to the extent it applied a bright-line test precluding award of fees for actions primarily involving issues of bankruptcy law without analyzing the terms of the lease between the parties and the effect of state law.). Clauses in an executory contract that result in a breach of the contract solely due to the bankruptcy filing of a party are considered "ipso facto" clauses which

are unenforceable under the Bankruptcy Code. *Agassi*, 269 B.R. at 553 n.3 (The court declined to consider an initial bankruptcy filing as a breach such that attorney fees incurred in connection with an assumption motion should not be considered fees incurred to address breach.).

Attorney fees may be awarded to an unsecured creditor in a bankruptcy proceeding only to the extent that state law governs the substantive issues and authorizes the court to award fees. *Renfrow v. Draper*, 232 F.3d 688, 694 (9th Cir. 2000). In *Renfrow*, the creditor successfully litigated the validity and amount of debt owed to her in a divorce decree. The bankruptcy court had to analyze state law substantive issues in order to determine whether the debt was dischargeable or not. *Id.* at 694. Although the ultimate issue in *Renfrow* was one of bankruptcy law, the bankruptcy court had to first determine whether the debt was dischargeable or not under state law. The mere presence of an attorney fee provision in a contract does not entitle a prevailing party to attorney fees. *See In re Hashemi*, 104 F.3d 1122, 1127 (9th Cir. 1996). The applicability of bankruptcy laws to particular contracts is not a question of the enforceability of a contract but rather involves a unique and separate area of federal law. *Id.* A § 502(b) objection is purely an issue of federal bankruptcy law and does not involve the issue of the enforceability or the validity of a contract. *See Vanston Bondholders Protective Committee v. Green*, 329 U.S. 156, 163 (1946). Therefore, litigating an issue under § 502(b) and how it applies to specific contracts would not result in the award of attorney fees to a prevailing party, absent a bankruptcy statute providing for attorney fees to such a prevailing party because § 502(b) is exclusively governed by federal law.

In this instance, the validity of the individual contracts is not at issue. The Appellants do not seek attorney fees incurred in litigating the validity of the contracts. The Appellants seek a blanket ruling that if

attorney fee provisions are included in the contracts, such fees are allowed as claims under 11 U.S.C. § 502(b). The issue before the Court is the interpretation of the Plan language that fees, costs, and expenses are allowable under the applicable law and whether the attorney fee provisions are allowed "claims" under 11 U.S.C. § 502(b). (See Appellant's Br., p. 23) This determination does not involve the validity of the contracts. As noted above, any determination under § 502(b) is purely a question of federal law. The Class 4 creditors are not entitled to attorney fees and expenses unless they incur expenses in enforcing the validity of the contract. Litigating the interpretation of the Plan and whether claims are allowed under § 502(b) does not involve a determination of whether under a substantive state law, the contract is valid. Without determining whether each of the contracts at issue contains attorney fee provisions since the individual contracts are not before the Court, the Court makes the following general ruling: if a contract contains an attorney fee provision and the creditor is required to litigate the *validity* of the contract, then the prevailing creditor is entitled to attorney fees and expenses incurred in litigating the validity of the contract. Inasmuch as the Class 4 creditors have not shown that they have incurred attorney fees in litigating the validity of their contracts, the Bankruptcy Court did not abuse its discretion in denying their summary judgment motion.

IV. CONCLUSION

For the reasons set forth above,

IT IS ORDERED that the Court AFFIRMS the Bankruptcy Court's May 3, 2001 Order, incorporating its April 19, 2001 oral ruling and DISMISSES this appeal.

DENISE PAGE HOOD,
United States District Judge

DATED: March 31, 2004

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

IN RE:	§	**Case No. 95-20512**
	§	
DOW CORNING	§	**Judge**
CORPORATION	§	**Arthur J. Spector**
	§	
	§	
DEBTOR	§	**Objection Docket**
	§	**No. 97-0009**

ORDER DENYING MOTIONS FOR PARTIAL SUMMARY JUDGMENT

The Court has considered fourteen motions for partial summary judgment (the "Motions") filed by various unsecured claimants,[1] the Debtor's responses thereto, and the parties' legal memoranda and oral argument. For the reasons announced from the bench at the conclusion of the hearing on the Motions on April 19, 2001, it is hereby

ORDERED that the Motions are denied in all respects.

Dated: May 3, 2001

/s/

ARTHUR J. SPECTOR
United States Bankruptcy Judge

[1] The Motions and the movants are identified on Exhibit 1 attached hereto.

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

IN THE MATTER OF,	Case No. 95-20512
DOW CORNING CORPORATION	Bay City, Michigan April 19, 2001
_____/	9:39 a.m

* * *

THE CLERK: United States Bankruptcy Court is now in session. Be seated, please.

THE COURT: So let's see, where was I?

MR. SHENFELD: Excuse me, Your Honor, I apologize for interrupting. Robert Shenfeld, Kelley, Drye on behalf of the Chase Manhattan Bank.

I didn't—I want to clarify. I'm responding to the motion against my clients, objection No. 88. I didn't know if you wanted to hear argument from me before you ruled or you're ruling just on the other motions?

THE COURT: I'm only going to rule on the motions that I heard, not on the ones I didn't hear.

MR. SHENFELD: Beg your pardon, Your Honor?

THE COURT: I'm only going to rule on the motion that I heard, not on the ones that I didn't hear yet.

MR. SHENFELD: Okay.

THE COURT: You want me to—I can write—I can hear the arguments on the others too first if you want.

MR. SHENFELD: No Your Honor. Mr. Tarpley had started this.

THE COURT: I heard a full argument on one motion and there are other motions, right? Mr. Tarpley hasn't begun

to make his argument on those others, so I could wait till they're all made, or I could do them one at a time like I was just about to do.

The first issue, we're dealing with the creditors' motions, just so it's clear. Just the creditors' joint motion, omnibus motion, whatever you want to call it dealing with the legal issue about default interest rate and costs and so forth. Default interest, we'll deal with that one first.

One of the issues with respect to which the Class 4 creditors seek summary judgment concerns the right to interest at the default rate, that is the rate of interest accrual which is triggered by the debtor's failure to timely repay a loan.

This rate, of course, is higher than than the base or non-default interest rate which applies when loan repayments are timely made. See generally *Invex Holdings, N.V. v. Equitable Life Insurance*, 179 BR 111 at 115, Northern District of Illinois, 1993, affirmed 27 F 3d 241, 7th Circuit 1994. "The standard practice of charging a higher interest rate after default is designed as an incentive to the debtor to make timely payments. However, its second purpose is to compensate the lender for any loss resulting from the default such as increased expenses administering the loan and delayed use of the money."

The debtor argues in response that entitlement to default interest must be determined on the basis of various equitable factors. This is in the debtor's memorandum of law at Page 9 which from now on I'll call the response to the joint memo. The creditors' memo we'll call the joint memo and the debtor's response we'll call the response to joint memo.

The factors that the debtor identifies are: One, whether the debtor was in default at the time of the bankruptcy petition. Two, whether there was a realistic risk of non-payment either before or during the bankruptcy case. Three, whether the increased rate of interest was related

to a creditor's actual losses or market rates of interest. Four, whether there was increased risk to the creditor following default. Five, whether default interest would confer a windfall upon the creditor. Six, whether the lender was partially responsible for any delays in plan confirmation. And seven, the difference between the non-default rate and the default rate. These I get from the response to the joint memo at Page 9.

The debtor asserts that the creditors have "failed to establish any set of undisputed facts on which the Court could conclude that the applicable factors favor their claims for default interest as a matter of law." That's in their memo at Page 4.

The debtor's equity-based argument is weak. See, *In Re: Keaton*, 212 BR 587 at 592 through 593, Eastern District of Tennessee, 1997, vacated on other grounds, 1998 Westlaw 228123, 6th Circuit, April 30th, 1998 suggesting that Courts should generally enforce the terms of a loan agreement which was negotiated by equally sophisticated parties. However, the Court does not see the point of addressing the strength of this equitable argument now as the creditors' motions face a more basic obstacle.

The debtor's reorganization plan was confirmed on November 30th, 1999. The treatment to be accorded Class 4 creditors is set forth in Section 5.1 of the plan.

"Each allowed unsecured claim in Class 4 shall include interest thereon from the petition date through the effective date at the—now it said applicable contract rate which we know has been changed at the time of confirmation, but it said that originally, and such fees, but it said the—I think it said some other term, but—strike that.

It meant originally something other than the applicable contract rate but as a result of the confirmation process it was re-worded to say the applicable contract rate. And such fees, costs, and expenses including pre-payment

penalties or liquidated damages, but only to the extent such fees, costs, and expenses are allowable under applicable law."

And as I said, "as originally proposed the interest was to be paid at the case interest rate and that part of the plan was deemed verbally amended to provide that pendency interest will be paid to Class 4 creditors in accordance with the terms of the parties' contracts." And that's citing *In Re: Dow Corning Corporation*, 244 BR 720—no, that's not the one. Well, it's—just a second, I've got it right here, 678 at Page 696.

And I quoted. That quote was from the amended joint plan of reorganization at Section 5.1 as amended as I indicated.

The applicable contract rate under the terms of the plan would presumably be the rate in effect on May 15th, 1995, the date Dow Corning's bankruptcy case commenced. "See, for—see the plan at Section 1.24 which defines case interest rate as for any unsecured claim, the federal judgment rate provided in 28 USC Section 1961 in effect on the petition date which was 6.28%." Also plan Section 1.126 defining petition date as May 15th, 1995, the date the debtor filed a petition commencing the case.

As of May 15th, 1995, the debtor was apparently not in default with respect to any of the loans at issue here. See joint memo at Pages 12 through 24 and the response to the joint memo at Pages 14, 17, and 31.

Now I'm going to carve out a caveat here I can come back to dealing with objection No. 90 which we'll have to talk to is a little bit different there. But generally stating—generally saying that being true, a straightforward application of the plan terms would mean that the creditors are entitled only to the base contract rate of interest. The creditors would therefore appear to be precluded from seeking to impose a higher rate now. See Section 1141(a) of the Code, "the provision of a confirmed

plan bind the debtor and any creditor." See also for example *Adair v. Sherman*, 230 F 3d 890 at 894, 7th Circuit, 2000 which cites cases from the 3rd, 4th, 9th, 10th, and 11th Circuits in support of the assertion that "once a bankruptcy plan is confirmed, its terms are not subject to collateral attack."

I'll take the—a sidetrack here. The creditors seem to ignore the highly defensible argument to be made that, except insofar as the plan provides otherwise, their much-relied-upon contracts are now irrelevant. See the *Dow Corning* case, *In Re: Dow Corning Corporation*, 244 BR at 686, "impairment of contract rights does not become effective until the plan is confirmed." Upon confirmation a creditor's contract rights, "can be said to have been extinguished." In the wake of confirmation it would seem that the only role the contracts play is in the determination of one, the base interest rate, sere plan Section 5.1, and two, the amount/validity of the creditor's allowed claim. See plan Section 5.1 again and 11 USC Section 502(b)(1) which provides generally that a claim is to be disallowed if it "is unenforceable against the debtor under any agreement or applicable law."

Now getting back to the body here, the Section 1141(a) as we stated binds both the creditors and the debtor to the terms of a confirmed plan.

And a decision of the 6th Circuit implicitly supports this conclusion. In *In Re: Terex Corporation*, 984 F 2d 170, 6th Circuit 1993, the debtor's confirmed plan stated that Metropolitan life Insurance Company's claim would be paid in cash on the distribution date. Meaning 20 business days after the plan's effective date. *Id.* at 171 Note 2 and accompanying text. The plan permitted the debtor to object to Metropolitan's claim, however, and the debtor did so. *Id.* at 172. Some three years after plan confirmation, the Bankruptcy Court allowed the claim and "awarded interest there on at a rate of 10% per annum from the effective date of the plan." *Id.* at 174.

On appeal, the debtor argued that the interest rate was contrary to the terms of the plan. The 6th Circuit disagreed and stated as follows:

"Contrary to Terex's contention, Section 2.5 does not preclude a retrospective award of interest. Section 2.5 merely sets the point in time, i.e. the distribution date, at which an allowed claim is to be paid. It does not say that a claim which after the distribution date is first classified as allowed cannot be awarded at the value owed on the distribution date or at the value owed on the effective date as mandated by Section 2.5 of the plan. Give the plausibility of the Bankruptcy Court's interpretation of the plan, we cannot conclude that the Court's construction of the plan was erroneous."

Id. If only by negative inference, then, *Terex* teaches that interest on a claim which is allowed post-confirmation can be awarded only if doing so is not inconsistent with the terms of the plan.

In the present case the Court does not see how one can reconcile the creditors' demand for default-rate interest with the plan's provision for application of the interest rate in effect when Dow Corning filed its petition. Indeed, the creditors themselves inadvertently underscore the wild discrepancy between the interest-related plan provisions and the interest terms that they are seeking. After making the assertion that they are, "at the very least entitled to be paid interest on all amounts due and owing from natural maturity until consummation of the debtor's plan", that's in the joint response at Page 46, they provide this explanatory footnote.

"In practice, this would mean that certain claimants would be entitled to pendency interest calculated as follows: A, ordinary, simple interest on outstanding principal from the petition date until natural maturity; B, interest at default rates where applicable on all interest arrears accruing from the petition date until maturity; and C, compound interest at default rates where

applicable on the full amount of outstanding principal and interest from maturity onward." *Id.* at 46 Note 23.

The foregoing explanation lends credence to the conclusion that the creditors are in effect seeking to modify the plan. Given the nature of the relief requested, it was incumbent upon the creditors to show either that, one, the award of default interest is consistent with the plan, appearances to the contrary notwithstanding; or two, although inconsistent with the plan, default interest is appropriate because the requirements for post-confirmation plan modification set forth in Section 1127 of the Code have been met or are for some reason inapplicable. Since they did neither their motions will be denied insofar as creditors ask for some kind of generic declaration that they are entitled to default interest. See generally Rule 56(c) of the Federal Rules of Civil Procedure incorporated to Federal Rule of Bankruptcy Procedure 7056 and 9014. Summary judgment shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits show that the moving party is entitled to a judgment as a matter of law.

Turning now to compound interest which Black's Law Dictionary defines as "interest paid on both the principal and the previously accumulated interest." Black's Law Dictionary, 7th Edition 1999. Also see the definition of simple interest in Black's which is "interest paid on the principal only and not on accumulated interest." In this opinion, however, we're going to use the term to refer solely to interest on interest is the way I believe the creditors' have argued it as well.

The positions staked out by the parties with respect to compound interest is basically the same as with default interest. The creditors argue that their contracts speak for themselves and should be fully enforced while the debtor asserts that the payment of compound interest

would be unfair. Here again the Court needs not—need not address the issue on these terms.

A creditor cannot have an allowed claim for unmatured interest. That's Section 502(b)(2) of the Code. This means, of course, that interest accruing post-petition is not allowable. See *United States*—strike that, *United Savings Association of Texas v. Timbers of Inwood Forest Associates*, 484 US 365 at 373, 1988 referring to the general rule disallowing post-petition interest" and—and citing Section 502(b)(2). Also see *Terex*, 984 F 2d at 173, "Section 502(b)(2) forbids accrual after the date of bankruptcy filing of unmatured interest on a claim." 4 Collier on Bankruptcy at Pages 502—at Page 502-27 Note 30, 15th Edition Revised 2000, "interest under"—strike that, "interest disallowed under the section we're dealing with, 502(b)(2), includes post-petition interest that is not yet due and payable on the date of bankruptcy." Citing legislative history at Senate Reports No. 989, 95th Congress, 2d Session Page 62, 1978.

In this case the creditors are apparently asserting a right to compound interest based solely on the debtor's failure to make timely post-petition payments. See joint memo at Pages 12 through 24, response to joint memo, Pages 14, 27, and 31. Recognition of this right would mean, in effect, that the creditors' allowed claims include interest accruing post-petition. Section 502(b)(2) precludes this result.

Another aside, there is no tension between Section 502(b)(2) and the rule that creditors of a solvent estate are entitled to post-petition interest. See *Dow Corning*, 244 BR at 685, "pendency interest whether based on Section 726(a)(5) or 1129(b)'s requirement that the plan be fair and equitable does not constitute an allowed claim. Thus the proposition that such interest must be paid is compatible with Section 502(b)(2)."

One could argue that the creditors have a right to compound interest based on general notions of fairness.

But this argument wouldn't be persuasive either. The plan already has a compound interest provision. See plan Section 1.24 indicating that interest is to be "compounded annually on each anniversary of the petition date." This, of course, rules out compounding at some other interval, as the creditors would like to see happen. See the joint memo at Pages 39 through 40. As with the—where they ask for daily compounding. As with the matter of default-rate interest the creditors just ignore the apparent tension between what the plan gives them in terms of compounding and what they are asking for. Thus, they are not entitled to summary judgment on this issue either.

Turning to costs. The creditors assert a contractual right to reimbursement from the debtor for various expenses related to the collection of their debts including attorney's fees.

Although the joint memo makes reference to stipulated damages, as I understand it that matter is not being addressed at this time.

We'll call these items collectively costs from hereafter. The debtor counters that these costs are not allowable citing the Code's instruction that claims are to be quantified "as of the date of filing—of the filing of the petition." 11 USC Section 502(b). Since the costs were "incurred post-petition:", the debtor reasons, "they are not part of the claim."

The debtor's flagship case is *In Re: Sakowitz, Incorporated*, 110 BR 268, Bankruptcy Southern District of Texas, 1989. The creditor in that Chapter 11 case had a claim which was undersecured, and sought allowance of post-petition attorney's fees based on the parties pre-petition contract. *Id.* at 268 through 69. The Court disallowed the fees reasoning as follows:

"Subsection 506(a) of the Bankruptcy Code expressly provides for both a secured and an unsecured portion of a

secured indebtedness where the value of the collateral is less than the debt. In the following subsection Congress provided for attorney fees only for the secured portion of such a claim. Congress must be presumed to have understood what it was doing. It could easily have provided for attorney fees for the unsecured portion of the claim as well as the secured portion. That it did not do so the Court feels is determinative of the issue before this Court under the maximum of expression unius est exclusion alterius. When coupled with the provision of Section 502(b), which provides for the determination of a claim as of the date of the filing of the petition, it is clear that the statutory scheme provided for by the Congress in the Bankruptcy Code excludes attorney's fees earned post-petition on unsecured proofs of claim or on the unsecured portion of a secured claim notwithstanding any contractual or statutory provision which would allow such fees outside of bankruptcy." *Id.* at 272.

The counter-argument to *Sakowitz* is articulated in a Chapter 13 case cited by the creditors in their joint response at Pages 35 through 36. And this is a lengthy cite—a lengthy quote. This is a quote from *In Re: Keaton*—let me check on this cite.

Keaton is 212 BR 587—587 Eastern District of Tennessee 1997. I already cited it earlier. It was also vacated on the grounds by the 6th Circuit. Anyway the quote goes as follows:

"By negative implication, 502(b)(1) allows contingent or unmatured claims which are enforceable against the debtor under any agreement or applicable law. Moreover, Section 101(5)(A) broadly defines claim to include a right to payment whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.

Here, it is undisputed that the bank is entitled to attorney fees under an agreement with debtors. Thus,

the question becomes whether the bank's claim is a contingent or unmatured claim within Sections 502(b)(1) and 101(5)(A). In considering this question the Court finds the 6th Circuit's decision in *In Re: Martin*, 761 F 2d 1163, 6th Circuit 1985 instructive. The creditor in *Martin*, 'filed an adversary proceeding to have its debt determined to be excepted from discharge under Section 523(a)(2)(B). The creditor also requested attorney's fees in – (a)(2)(B)'. The creditor also requested attorney's fees in prosecuting the adversary proceeding.

The Court first determined the creditor was entitled to an exception from discharge. Next, in considering whether the creditor was entitled to attorney's fees, the Court reasoned:

Creditors are entitled to recover attorney's fees in bankruptcy claims if they have a contractual right to them valid under state law. A contractual right to attorney's fees is part of the debt. *Martin*, 761 F 2d at 1167 through 68.

Although the *Martin* Court did not face the precise issue presented in this case, its reasoning is nevertheless helpful in considering the claim at hand. By the way, I'm still quoting from the *Keaton* decision. The *Martin* Court's conclusion that 'a contractual right to attorney fees is part of the debt' lends force to the argument that the bank's attorney fees claim arose prior to the filing of the petition. In other words, by virtue of the contract, the bank had a pre-petition right to collect attorney's fees, albeit an unmatured, contingent right, i.e. the right was contingent upon the bank actually incurring attorney's fees in collecting the debt'. No, not unquote, start quote. 'While the representation may have been performed after the petition was filed, the right to collect attorney's fees arose out of the contract and is a pre-petition claim'.

According to debtors even if the bank has a pre-petition claim for attorney's fees, it is barred by Section 506(b).

Reduced to its essential elements debtors' argument rests on the principle of expression unius est exclusio alterius.

Despite its logical appeal, this argument rests on a faulty premise. Debtors assume Section 502(b) does not allow unsecured—undersecured creditors to claim attorney's fees incurred after the petition is filed. As noted previously, the Court finds Section 502(b) is sufficiently broad to allow contingent unmatured attorney's fees as a pre-petition claim.

Anticipating a finding that attorney fees are allowed under Section 502(b), debtors argue Section 502(b) and they and this is a mistake in the opinion. It should have said 506(b) is superfluous if Section 502(b) allows attorney's fees. This argument is also unpersuasive. The obvious structure of the Bankruptcy Code and the plain language—plain language of Section 506 reveal that Section 506(b) does not allow attorney fee claims of oversecured creditors, it makes those claims secured claims to the extent of the excess collateral.

According to the United States Supreme Court, Section 506, 'governs the definition and treatment of secured claims'. *United States v. Ron Pair Enterprises*, 489 US 235, 1989. Both the House report and the Senate report accompanying the Bankruptcy Reform Act of 1978 state Section 506(b):

Codifies current law by entitling a creditor with an oversecured claim to any reasonable fee, costs, or charges provided in the agreement under which the claim arose. These fees, costs, and charges are secured claims to the extent that the value of the collateral exceeds the amount of the underlying claim.

That's a quote from House of Representatives Report No. 95-595 at Pages 356 and 57, 1977. And also the Senate Report No. 95-989 at Page 68, 1978.

Thus, Section 506(b) is not superfluous. It supplements the general allowance of Section 502 by elevating oversecured claims for attorney's fees to secured status."

That's all quoted from the *Keaton* case 212 BR at 589 through 592.

The gist of *Keaton's* reasoning with respect to Section 506(b) is that this provision is not the last word on the allowance of claims of the type described therein. If the value of the collateral is insufficient to secure such a claim, or if there is no collateral at all, *Keaton* implies, it may nevertheless be allowed as an unsecured claim.

Thus, the debate between cases like *Keaton* and *Sakowitz* boils down to the question of whether Section 506(b) implicitly precludes allowance of the claims described therein except insofar as there is collateral to support the claim. While there is merit to both views, the less restrictive interpretation makes the most sense. Moreover, the Supreme Court has given some indication that it favors the no-negative-inference interpretation of Section 506(b). See *Timbers of Inwood Forest*, 484 US at 372 and 73, "since 506(b) permits post-petition interest to be paid only out of the security cushion, the undersecured creditor who has no such cushion, falls within the general rule disallowing post-petition interest. See USC Section 502(b)(2)." But while we are inclined to reject the debtor's contention that the creditors are prohibited by Section 506(b) from recovering costs, again the Court need not rule on that issue now.

Assuming for present purposes that Section 506(b) is not an obstacle, the creditors must still establish that the costs are in fact allowable pursuant to 502(b). On this issue they argue that as of the petition date, their right to reimbursement for costs was contingent and was therefore a claim under 101(5)(A) and not subject to disallowance pursuant to 502(b)(1). See the joint memo at Page 35.

The creditors cite a case which supports this argument, *In Re: Hemingway Transport*, 954 F 2d Page 1 at Page 9, 1st Circuit 1992. In that case a creditor called Woburn had a claim for reimbursement of attorney's fees pursuant to an indemnity provision. The Court explained, "given the great breadth of the term claim as defined under the Bankruptcy Code, we conclude that Woburn held a pre-petition claim against Hemingway at the time of the Chapter 11 petition, albeit a right to payment contingent on a future occurrence reasonably within the contemplation of the parties." However the creditors failed to cite a case, a 6th Circuit case which defines the term claim much more restrictively.

That's what gets me to the *CPT* case which I quoted extensively in the argument portion. I'm not going to repeat that very long cite, or the very long quote, but I will explain that although the *CPT Holdings* case involves statutorily-imposed liability, the court's rationale has obvious relevance to cases involving a would-be claim based on breach of contract. Such as *United Merchants*, 166 BR at 239. "If UM&M had withdrawn pre-confirmation, then since the fund was underfunded, the legal relationship Remington requires would exist. That withdrawal would be analogous to Remington's breach of the contract." Indeed, the 6th Circuit and *United Merchants* for that matter, adopted the reasoning of just such a case, that would be the Remington case. What *CPT Holdings* clearly indicates, then, is that the creditors in this case held no pre-petition claim for costs, as the breach giving right to—giving rise to a right of reimbursement occurred post-petition.

Now to the extent that Martin, the 6th Circuit case cited in *Keaton* but which did not directly address the issue of contingency is contrary to *CPT Holdings*, it would seem that its been implicitly overruled by the latter case.

As indicated, the creditors don't cite *CPT Holdings*, but then again neither did the debtor, much less attempt to

demonstrate why that case is not controlling. Thus, they have failed to demonstrate that they have a right to summary judgment on the issue of costs.

Based on the foregoing, the various motions filed by the creditors will be denied insofar as they seek an affirmative declaration that they are entitled to compound or default rate interest or costs.

And we will now take a moment to let the debtor tee up its objections to objection No. —not objections to, but objection No. 88. Oh, I said I was going to get back to No. 90. That's a separate matter on No. 90. No. 90 is not being argued today separately, is it?

MR. TARPLEY: No, Your Honor.

THE COURT: But there is a differentiation on No. 90 I ought to make clear before I finish. This deals with the notion that the debtor was apparently not in default with respect to any of the loans at issue when the bankruptcy case was filed.

In the Dow Corning decision, 244 BR at 696 the Court ruled that the mere act of seeking bankruptcy relief could not be deemed a default. And I stated, "in determining the applicable rate, no effect is to be given to contractual provisions which purport to define as a default the filing of a voluntary petition for bankruptcy relief."

One of the agreements, the subject of objection No. 90, required Dow Corning to "repay in full on the termination date the aggregate principal amount of the revolving loans outstanding." Joint Exhibit F at Section 2.07. The termination date was no later than "the date on which the aggregate commitment shall terminate in accordance with the provisions of this agreement." *Id.* at Page 17. The agent representing the banks who entered into this agreement argued that because of these provisions the "revolving loans matured upon the commencement of the Chapter 11 case but not by reason of a default being triggered by ipso facto clause." Bank of America's motion

at Pages 7 through 8. This argument is flawed because the agent isn't relying on a provision of the agreement itself as demonstrating that the aggregate commitment terminated on May 15th, 1995. Rather, it asserts that , based on "11 USC Section 365(e)(2)(B), the banks had no further obligation to extend credit to DCC." And that means Dow Corning Corporation, I understand. *Id.* at Page 8.

If there's nothing in the bank's agreement specifying that the commitment terminated with the bankruptcy filing, then May 15th was not the termination date. See Joint Exhibit F at Page 17 defining termination as occurring, "in accordance with the provisions of this agreement." And if there is such a provision, then of course you've got an ipso facto clause.

Perhaps recognizing the weakness of this argument, the agent also asserts that, "where the contract provides for automatic termination at the time of filing it should be given effect at that time." Bank of America's supplemental motion at Page 3. In essence, the agent is asking the Court to reconsider its ruling with respect to the validity of ipso facto clauses. This request is probably too late, and in any event should not be considered in the context of a claims–allowance process. See *Harmon v. United States*, 101 F 3d 574 at 583, Note 5, 8th Circuit 1996. "If the Government were challenging something that happened in the confirmation proceedings or raising an argument that could have been decided during the confirmation hearing, those arguments would be barred except on appeal of the confirmation order."

Even if the agent's argument is accepted and one concludes that the bank's debt matured on the petition date, Dow Corning presumably was not in default until at the latest, the close of business on the petition date. Thus, there was no pre-petition default. For this reason any default of Dow Corning's swap agreement with Farallon Capital Partners claim matured on the petition

date, see Farallon's motion at Page 7, would also have been post-petition.

Okay. that fully disposes of the creditors' motions. Now we turn to the debtor's motions.

* * *

(1)

No. 06-705

FILED
DEC 21 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

DOW CORNING CORPORATION,

Petitioner,

v.

OFFICIAL COMMITTEE OF UNSECURED CREDITORS, MERRILL LYNCH, PIERCE, FENNER & SMITH, BANK OF AMERICA, N.A., BANK OF NEW YORK, JP MORGAN CHASE, DK ACQUISITION PARTNERS, L.P., HALCYON MANAGEMENT CO. LLP, HALCYON OFFSHORE MANAGEMENT CO., LLC, ANGELO, GORDON & CO., DAVIDSON KEMPNER INTERNATIONAL ADVISORS, M.H. DAVIDSON CO., INC., APPALOOSA MANAGEMENT, LLC, FRANKLIN MUTUAL ADVISORS, LLC, BEAR STEARNS & CO., INC., BEAR STEARNS GOVERNMENT SECURITIES, INC., BEAR STEARNS INVESTMENT PRODUCTS, INC., CUSTODIAL TRUST CO., NEWSTART FACTORS, INC., FARALLON CAPITAL PARTNERS, L.P., FARALLON CAPITAL INSTITUTIONAL PARTNERS, L.P., FARALLON CAPITAL INSTITUTIONAL PARTNERS II, L.P., FARALLON CAPITAL INSTITUTIONAL PARTNERS III, L.P., FARALLON CAPITAL OFFSHORE INVESTORS, INC., FARALLON CAPITAL MANAGEMENT, LLC, JP MORGAN CHASE BANK, CONSOLIDATED PRESS INTERNATIONAL, THE COMMON FUND, TINICUM PARTNERS LP, CREDIT SUISSE FIRST BOSTON MANAGEMENT CORP., AMROC INVESTMENTS, INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Where a solvent debtor's plan of reorganization was confirmed after being amended to overcome an objection, sustained by the Bankruptcy Court, that the plan violated Section 1129(b) of the Bankruptcy Code, whether the Bankruptcy Court must subsequently interpret the amended plan to be consistent with the confirmation order and Section 1129(b).

2. Where a class of creditors rejected the plan of reorganization of a solvent debtor that sought to impair their contractual rights, and the debtor nevertheless attempted to confirm the plan, whether attorneys' fees and other costs incurred to successfully oppose the plan in order to enforce the creditors' contractual rights may be recovered.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondents on whose behalf this brief is being filed state the following:

Appaloosa Management L.P. Appaloosa Management L.P. is a Delaware limited partnership and as such does not have a parent company. Its general partner is Appaloosa Partners Inc., a Delaware corporation. Not more than 10% of either entity is held by a publicly traded company.

Bank of America, N.A. Bank of America, N.A. is 100% owned by NB Holdings, Inc., which is 100% owned by Bank of America Corporation. The securities of Bank of America Corporation are publicly traded. No publicly held company owns 10% or more of its stock.

Bear Stearns & Co., Inc. The Bear Stearns Companies, Inc. is the parent company of Bear Stearns & Co., Inc.

Bear Stearns Investment Products, Inc. (f/k/a Bear Stearns Government Securities, Inc.) Bear Stearns Government Securities, Inc. has changed its name to Bear Stearns Investment Products, Inc., and the Bear Stearns Companies, Inc. is the parent company of Bear Stearns Investment Products, Inc.

The Common Fund. The Common Fund has no parent company, and no publicly held company owns 10% or more of its stock.

Consolidated Press International. Consolidated Press International has no parent company, and no publicly held company owns 10% or more of its stock.

Credit Suisse First Boston Management LLC (f/k/a Credit Suisse First Boston Management Corporation). Credit Suisse Group is the parent company of Credit Suisse First Boston Management LLC.

Custodial Trust Co. Custodial Trust Co. has no parent company, and no publicly held company owns 10% or more of its stock.

D.K. Acquisition Partners, L.P. D.K. Acquisition Partners, L.P. has no parent company, and no publicly held company owns 10% or more of its stock.

Davidson Kempner International Advisors. Davidson Kempner International Advisors has no parent company, and no publicly held company owns 10% or more of its stock.

Farallon Capital Institutional Partners, L.P. Farallon Capital Institutional Partners, L.P. has no parent company, and no publicly held company owns 10% or more of its stock.

Farallon Capital Institutional Partners II, L.P. Farallon Capital Institutional Partners II, L.P. has no parent company, and no publicly held company owns 10% or more of its stock.

Farallon Capital Institutional Partners III, L.P. Farallon Capital Institutional Partners III, L.P. has no parent company, and no publicly held company owns 10% or more of its stock.

Farallon Capital Management, LLC. Farallon Capital Management, LLC has no parent company, and no publicly held company owns 10% or more of its stock.

Farallon Capital Offshore Investors, Inc. Farallon Capital Offshore Investors, Inc. has no parent company, and no publicly held company owns 10% or more of its stock.

Farallon Capital Partners, L.P. Farallon Capital Partners, L.P. has no parent company, and no publicly held company owns 10% or more of its stock.

Franklin Mutual Advisers, LLC. Franklin Mutual Advisers, LLC is a limited liability company, the sole member of which is Franklin/Templeton Distributors, Inc., which in turn is a wholly-owned subsidiary of Franklin Resources, Inc. Franklin Resources, Inc.'s securities are publicly traded.

Franklin Resources, Inc. has no parent company, and no publicly held company owns 10% or more of its stock.

Halcyon Asset Management, LLC. Halcyon Asset Management, LLC has no parent company, and no publicly traded company owns 10% or more of its stock.

Halcyon Offshore Asset Management, LLC. Halcyon Offshore Asset Management, LLC has no parent company, and no publicly traded company owns 10% or more of its stock.

JPMorgan Chase Bank, N.A. JPMorgan Chase & Co. is the parent company of JPMorgan Chase Bank, N.A.

M.H. Davidson Co., Inc. M.H. Davidson Co., Inc. has no parent company, and no publicly held company owns 10% or more of its stock.

Merrill Lynch, Pierce, Fenner & Smith Incorporated. Merrill Lynch & Co., Inc. is the parent company of Merrill Lynch, Pierce, Fenner & Smith Incorporated.

Murray Capital Management, Inc. Murray Capital Management, Inc., has no parent company, and no publicly held company owns more than 10% or more of its stock.

Newstart Factors, Inc. Newstart Factors, Inc. has no parent company, and no publicly held company owns 10% or more of its stock.

Official Committee of Unsecured Creditors. The Official Committee of Unsecured Creditors is an official statutory committee appointed under the Bankruptcy Code to represent the interests of the unsecured creditors in the bankruptcy case of Dow Corning Corporation. Accordingly, the Official Committee of Unsecured Creditors has no parent company and does not issue stock.

Tinicum Partners LP. Tinicum Partners LP has no parent company, and no publicly held company owns 10% or more of its stock.

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CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED IN CASE

1129. Confirmation of plan

(a) The court shall confirm a plan only if all of the following requirements are met:

* * *

(7) With respect to each impaired class of claims or interests—

(A) each holder of a claim or interest of such class—

(i) has accepted the plan; or

(ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date; or

(B) if section 1111(b)(2) of this title applies to the claims of such class, each holder of a claim of such class will receive or retain under the plan on account of such claim property of a value, as of the effective date of the plan, that is not less than the value of such holder's interest in the estate's interest in the property that secures such claims.

(8) With respect to each class of claims or interests—

(A) such class has accepted the plan; or

(B) such class is not impaired under the plan.

* * *

(b)(1) Notwithstanding section 510(a) of this title, if all of the applicable requirements of subsection (a) of this

section other than paragraph (8) are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

(2) For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements:

* * *

(B) With respect to a class of unsecured claims—

(i) the plan provides that each holder of a claim of such class receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or

(ii) the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property, except that in a case in which the debtor is an individual, the debtor may retain property included in the estate under section 1115, subject to the requirements of subsection (a)(14) of this section.

IN THE

Supreme Court of the United States

No.06-705

DOW CORNING CORPORATION,

Petitioner,

v.

OFFICIAL COMMITTEE OF UNSECURED CREDITORS, MERRILL LYNCH, PIERCE, FENNER & SMITH, BANK OF AMERICA, N.A., BANK OF NEW YORK, JP MORGAN CHASE, DK ACQUISITION PARTNERS, L.P., HALCYON MANAGEMENT CO. LLP, HALCYON OFFSHORE MANAGEMENT CO., LLC, ANGELO, GORDON & CO., DAVIDSON KEMPNER INTERNATIONAL ADVISORS, M.H. DAVIDSON CO., INC., APPALOOSA MANAGEMENT, LLC, FRANKLIN MUTUAL ADVISORS, LLC, BEAR STEARNS & CO., INC., BEAR STEARNS GOVERNMENT SECURITIES, INC., BEAR STEARNS INVESTMENT PRODUCTS, INC., CUSTODIAL TRUST CO., NEWSTART FACTORS, INC., FARALLON CAPITAL PARTNERS, L.P., FARALLON CAPITAL INSTITUTIONAL PARTNERS, L.P., FARALLON CAPITAL INSTITUTIONAL PARTNERS II, L.P., FARALLON CAPITAL INSTITUTIONAL PARTNERS III, L.P., FARALLON CAPITAL OFFSHORE INVESTORS, INC., FARALLON CAPITAL MANAGEMENT, LLC, JP MORGAN CHASE BANK, CONSOLIDATED PRESS INTERNATIONAL, THE COMMON FUND, TINICUM PARTNERS LP, CREDIT SUISSE FIRST BOSTON MANAGEMENT CORP., AMROC INVESTMENTS, INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

The Court should deny the petition for a writ of *certiorari* filed by Dow Corning Corporation ("Dow Corning" or

"Petitioner"), a solvent debtor that emerged from bankruptcy years ago. Petitioner seeks interlocutory review of a decision of the Court of Appeals for the Sixth Circuit that is not in conflict with any decision of this Court or of any Court of Appeals. On the contrary, the decision is consistent with *Stoll v. Gottlieb*, 305 U.S. 165 (1938), and a long line of cases holding that a confirmation order is binding precedent.

Petitioner contends that the decision of the Court of Appeals permitted a collateral attack upon a bankruptcy confirmation order, and warns that, if left standing, the decision will fatally undermine the principle of finality that applies to such orders. Petitioner also suggests that consideration of the petition should be withheld pending this Court's resolution of another petition addressing attorneys' fees in bankruptcy cases.

The concerns expressed in the petition are unfounded. The decision below did not involve, let alone condone, a collateral attack upon a confirmation order. Rather, the ruling, and the facts upon which it was based, present the opposite circumstance. Respondent creditors (the "Class 4 creditors") rejected a proposed reorganization plan. At confirmation, they objected to the plan on the ground that the plan violated Section 1129(b) of the Bankruptcy Code. The Bankruptcy Court *sustained* that objection. With Petitioner's consent, the Court deemed the plan amended so as to conform to the requirements of Section 1129(b), and confirmed the plan as amended (the "Plan").

Two years later, the Bankruptcy Court inexplicably issued a decision interpreting the plan amendment that was completely at odds with its earlier ruling. The Class 4 creditors appealed. Their appeal was not a collateral *attack* on the Bankruptcy Court's original ruling confirming the Plan, which had sustained Class 4's objection, but an effort to *enforce* that ruling. The decision of the Sixth Circuit, holding that the Bankruptcy Court's analysis of its own prior order was required to conform to the same rule of law that

mandated the original ruling, creates no conflict among the Circuits, and certainly neither involved, nor condoned, any collateral attack.

Petitioner also contends that a split among the Circuits is raised by the holding that Class 4's contractual attorneys' fees and costs must be paid by the solvent Dow Corning, and notes that this Court has agreed to consider a case raising an attorneys' fees issue in an entirely different context. As shown below, there is no reason to delay disposition of this petition pending a decision in that case.

COUNTER-STATEMENT OF THE CASE

The petition acknowledges that Dow Corning was solvent when it proposed in its plan that shareholders retain billions of dollars in equity in the reorganized entity. But the petition fails to acknowledge that Dow Corning's solvency, and the plan of reorganization it proposed, brought into play legal principles that arise very rarely in Chapter 11. Dow Corning's solvency, and its unsuccessful efforts to confirm a reorganization plan impairing the rights of creditors who rejected the plan, differentiated this case from other bankruptcy cases, and mandated the result reached by the Court of Appeals.

1. Petitioner Was The Rare Solvent Debtor

Because Dow Corning was solvent, its creditors were entitled to receive interest on their claims. Dow Corning's proposed plan did provide for payment of "pendency interest"—interest payable for the period of the pendency of a Chapter 11 reorganization—to Class 4 creditors, but dictated that interest would be awarded only at the federal judgment rate, which was much less than the rates set by some contracts. Pet. App. at 3a. Although by then the case had already been pending for four years, the plan also failed to apply the rates applicable after the natural maturity of Class

4's contractual debt obligations. As a result, Class 4 creditors voted overwhelmingly to reject the proposed plan. *Id.* at 4a.

2. Class 4 Objections Sustained At Confirmation Hearing

Dow Corning then sought to "cram down" the plan over the dissenting vote of Class 4.[1] Class 4 creditors objected to confirmation, contending that the plan, proposed by a solvent debtor, was not "fair and equitable" within the meaning of Section 1129(b), because the plan denied Class 4 creditors the full measure of interest, including default interest, provided under their contracts. *Id.* Class 4 sought enforcement of the absolute priority rule, codified in Section 1129(b), which requires, in a solvent case, that creditors' claims, including claims for contract interest, be fully satisfied before equity holders may receive any value. *See, e.g., Case v. L.A. Lumber Prods. Co.*, 308 U.S. 106, 115-18 (1939); *In re Chicago, Milwaukee, St. Paul & Pacific R.R. Co.*, 791 F.2d 524 (7th Cir. 1986); *Debentureholders Protective Comm. of Cont'l Inv. Corp. v. Cont'l Inv. Corp.*, 679 F.2d 264 (1st Cir. 1982).

In an opinion dated December 1, 1999, the Bankruptcy Court *sustained* Class 4's objection. Pet. App. at 5a ("The court stated that it was sustaining Class 4's objections . . . .") The Court held that:

> "Where the debtor is *solvent*, the bankruptcy rule is that where there is a *contractual* provision, valid under state law, providing for interest on unpaid installments of interest, the bankruptcy court will enforce the contractual provision with respect to both instalments [sic] due before and . . . after the petition was filed." Pet.

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[1] The "cramdown" provisions of the Code permit confirmation of a plan over the objection of a class of dissenting creditors *only* if the "absolute priority" and "best interest of creditors" tests are met as to that class. 11 U.S.C.§ 1129(a), (b)(1)-(2).

App. at 5a (quoting *In re Dow Corning Corp.*, 244 B.R. 678, 695-96 (Bankr. E.D. Mich. 1999)).

At the confirmation hearing Dow Corning committed to pay "whatever we have to pay once the courts have determined" the appropriate interest rate. *Id.* at 35a. Based upon that commitment, the Bankruptcy Court deemed the Plan to have been "verbally amended to provide that pendency interest will be paid to Class 4 creditors *in accordance with the terms of the parties' contracts*," and on that basis confirmed the Plan *Id.* at 5a-6a (emphasis added).[2] Obviously, no appeal was taken by Class 4—Class 4's objection had been sustained. Nor did Dow Corning appeal, as it had acceded to the amendment of the Plan.

3. The Bankruptcy Court's 2001 Decision

Two years later, Dow Corning objected to Class 4's claims insofar as they sought default interest or other fees and costs as provided in their contracts. Pet. App. at 6a. Astonishingly, in light of the confirmation order, the Bankruptcy Court ruled that the Plan limited Class 4's recovery of pendency interest to the contractual rates in effect on the date of Dow Corning's bankruptcy petition. The new ruling took no account of

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[2] Although the Bankruptcy Court stated that "[i]n determining the applicable rate . . . no effect is to be given to contractual provisions which purport to define as a default a voluntary petition for bankruptcy relief," the Court did not carve out from "the terms of the parties' contracts" the terms providing that other events—for example, Dow Corning's failure to repay debt when it matured—would trigger a default. Since this case was commenced over eleven years ago, the natural maturities of Dow Corning's most significant debt contracts have long since passed. After those maturities were reached, payment in full was required in accordance with the terms of the contracts. Although the Plan required that payment be made "in accordance with the terms of the parties' contracts," no payments were made, and the contracts went into default, triggering the imposition of default interest—not as a matter of the bankruptcy filing itself, but due to other post-filing events.

default interest due as a consequence of maturities occurring after the filing of the chapter 11 petition, six years earlier. *Id.* at 57a-58a.

Having sustained Class 4's objection, in 1999, and having ruled that "the Plan" could be confirmed only if it were amended to provide for payment of interest in accordance with the terms of Class 4's contracts, the same Court, in 2001, ruled that "the Plan" did not require payment of interest in accordance with the terms of Class 4's contracts. The decision was inexplicable.

4. The Decision of the District Court

Class 4 appealed. *Id.* at 7a. Dow Corning moved to dismiss the appeal, arguing, *inter alia*, that it was an untimely appeal of the confirmation order. *See In re Dow Corning Corp.*, 2002 WL 551020, at *1 (E.D. Mich. Mar. 29, 2002). The District Court followed this Court's guidance on "when parties should be allowed to appeal an order entered subsequent to a court's final judgment." *Id.* at *3 ("The question is whether the lower court, in its second order, has disturbed or revised legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality.") (quoting *FTC v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206 (1952)). Applying that test, the District Court concluded that the Bankruptcy Court's ruling "changed the Confirmation Order in a material way," and thus Class 4's appeal was timely. *See id.* at *4. Dow Corning did not appeal this order.

On the merits, the District Court affirmed the Bankruptcy Court's ruling regarding the applicable interest rate. Pet. App. 34a. Class 4 creditors appealed to the Court of Appeals for the Sixth Circuit. That Court reversed on July 26, 2006. *Id.* at 1a, 32a.

5. The Decision of the Court of Appeals

The Court of Appeals for the Sixth Circuit held that the Bankruptcy Court's construction of the Plan, which caused it to violate the "fair and equitable" requirement of Section 1129(b), was an abuse of discretion.[3] Pet. App. 18a. The Court determined, as had the Bankruptcy Court in 1999, that because Class 4 had rejected the plan, the plan could not have been confirmed unless it complied with the absolute priority rule. Therefore, as Dow Corning was solvent, all contractual claims were required to be paid in full before equity holders could retain any value. *Id.* at 16a. Noting that "solvent bankruptcy estates are somewhat of a rarity," the Court held that in such cases courts generally confine themselves to "determining and enforcing whatever pre-petition rights a given creditor has against a debtor." *Id.* at 17a.

> "Based on this application of the absolute priority rule in solvent debtor cases, Class 4 argues that we should enforce their rights under the contract, including their

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[3] The Sixth Circuit ruled that the proper standard of review was abuse of discretion, because the Bankruptcy Court's second ruling interpreted, rather than modified, the Plan. Pet. App. 11a. Petitioner devotes a considerable amount of its petition to discussion of the merits of this part of the ruling, essentially arguing that, because the Sixth Circuit held that any interpretation of the Plan that was inconsistent with the legal principles that mandated the amendment of the Plan prior to confirmation would be an abuse of discretion, the Sixth Circuit was advocating collateral attack upon the confirmation order and thus creating a conflict among the Circuits. Petitioner has not sought *certiorari* on the issue, and the issue is not fairly presented within the questions for which review is sought; therefore, this argument requires no response. In any event, as noted, Petitioner's contention is not consistent with the facts in this case. It was the Bankruptcy Court's failure to conform its plan interpretation to the rule of law that mandated its earlier ruling in 1999 that the Sixth Circuit found to be an abuse of discretion. Further, Petitioner made the same arguments in the *en banc* petition. No member of the Sixth Circuit voted to rehear the case. *See* Pet. App. at 32a.

> right to interest awarded at the default rate as set forth in the terms of their contract. We agree." *Id.* at 18a.

The Court then addressed the District Court's refusal to grant attorneys' fees and costs mandated by some of the Class 4 contracts.

> "If the analogy between the rights of the undersecured creditors to recover interest and that creditors' rights to recover fees, costs and expenses is apt, then Class 4 should be able to recover fees, costs and expenses from Dow Corning, a solvent debtor." *Id.* at 23a.

The Court of Appeals stated that this outcome was consistent with the body of cases addressing contract recoveries where a debtor was solvent, *id.* at 23a-24a, and went on to consider whether the law in the Sixth Circuit places any limitation upon contractual reimbursement rights for fees and expenses. Following *Vanston Bondholders Protective Committee v. Green*, 329 U.S. 156, 161 (1946), the Court held that the validity and construction of a contractual claim to such fees is governed by state law. *See* Pet. App. at 27a. The Court recognized that the Ninth Circuit has held that attorneys' fees expended litigating issues solely of federal bankruptcy law are not recoverable, but found that no such limitation existed in the Sixth Circuit. *Id.* at 29a-30a. The Court remanded for consideration of the fees permitted under specific contracts and applicable state law. *Id.* at 31a.

REASONS THE PETITION SHOULD BE DENIED

A. There Is No Conflict Among the Circuits Concerning Collateral Attack on a Confirmed Plan of Reorganization

The petition asserts that the decision below dangerously undermines principles of finality in bankruptcy cases by permitting collateral attack upon a final confirmation order. But the facts demonstrate that the petition is wrong. The decision below is entirely in accord with prior law, based

upon the venerable rule of *Stoll v. Gottlieb*, 305 U.S. 165 (1938), that a final confirmation order binds everyone—the debtor, its creditors, and the court.

Unlike the cases cited by Dow Corning, in which the party bringing a true collateral attack failed to assert an objection to confirmation of a plan, in this case, Class 4 rejected the plan, objected to its confirmation, and litigated precisely the matter now at issue. The Bankruptcy Court ruled in its favor. The plan was amended to conform to the ruling, and then confirmed.

The cases cited by Dow Corning are factually opposite, though their rulings on the law support the Sixth Circuit's decision. In *Republic Supply Co. v. Shoaf*, 815 F.2d 1046 (5th Cir. 1987), a creditor failed to object to a plan provision, and then asked the court, in a later proceeding, to read the plan provision out of the plan, arguing that the provision was illegal. The Fifth Circuit held that "[q]uestions of the propriety or legality of the bankruptcy court confirmation order are indeed properly addressable on direct appeal. Republic, however, is now foreclosed from that avenue of review because it chose not to pursue it." *Id.* at 1050. Similarly, in *Stratosphere Litigation L.L.C. v. Grand Casinos, Inc.*, 298 F.3d 1137 (9th Cir. 2002), a creditor failed to object at confirmation to a plan provision releasing a third party. When the creditor later claimed that the release was contrary to law, the court agreed, but held that collateral attack on the plan was barred. And finally, in *In re Varat Enterprises*, 81 F.3d 1310 (4th Cir. 1996), a creditor objected to the classification of its claim in a plan of reorganization. The plan was amended to resolve this creditor's objection. After confirmation, a second creditor objected to the treatment afforded the first creditor's claim. The court ruled, "[i]n its post-confirmation objection, First Union argues that no legal basis supported [the creditor's] alleged secured status or the [creditor's] asserted equitable lien. Because First Union

could have raised the contentions in a pre-confirmation objection or at the confirmation hearing, it is barred from litigating them now." *Id.* at 1317.

Here, the plan was initially illegal, in that it violated Section 1129(b). Class 4 objected, and asserted its legal right under Section 1129(b) to payment, from a solvent debtor, in accordance with relevant contracts. Class 4's objection was *sustained.* With Dow Corning's consent, the plan was deemed amended to provide that contract interest would be paid to Class 4 "in accordance with the terms of the parties' contracts." The Plan, as confirmed, complied with the law, and all parties were bound by it. The Court of Appeal ruling simply mandates enforcement of the confirmation order, as do the cases cited by Petitioner. Class 4 creditors did not undertake, nor did the Sixth Circuit condone, a collateral attack upon the confirmation order.

Dow Corning contends that the Sixth Circuit broke new ground by ruling that a court may not interpret a bankruptcy plan so as to violate the Bankruptcy Code. *See* Pet. App. at 7. The argument is specious. Any ruling addressed to the treatment of claims was required to comply with the treatment mandated by the confirmed Plan. *See* 11 U.S.C. § 1141(a). The Plan required payment "*in accordance with the terms of the parties' contracts,*" to comply with Section 1129(b). The Bankruptcy Court's 2001 ruling held that payment need *not* be in accordance with the terms of the parties' contracts. That decision was the true collateral attack in this case, not the Sixth Circuit's decision.

B. There Is No Reason to Withhold Action Pending Review of *Travelers*

The decision below concludes that contractual attorneys' fees and costs must be paid by a solvent debtor, absent any state law bar. Dow Corning contends that this holding is in conflict with Ninth Circuit law, and notes that this Court has

agreed to review a Ninth Circuit decision regarding recovery of attorneys' fees. *See Travelers Cas. & Surety Co. of Am. v. PG&E Co.*, 167 F. App'x 593, *cert. granted*, 127 S. Ct. 377 (2006) (No. 05-1429).

The facts in the present case are materially different from the facts in the *Travelers* case. There, the debtor had not defaulted on its obligation to the creditor-petitioner, and the plan of reorganization did not impair the creditor's claim.[4] The creditor's attorneys' fees and costs were generated in litigation over matters arising during the plan confirmation process that did not bear upon either the amount, or the payment, of its claim, but rather addressed its future rights. Here, in contrast, Dow Corning had defaulted, and the Class 4 creditors' claims were impaired by the plan in a manner that was held by both the Bankruptcy Court and the Sixth Circuit to violate the law, given Dow Corning's solvency. Dow Corning then tried to force confirmation over Class 4's objections. Class 4 creditors were required to incur attorneys' fees to vindicate their state law contractual rights in the context of a plan that proposed to dishonor those rights.

In any event, the Court of Appeals' decision is interlocutory. Because the lower courts had held as a matter of law that Dow Corning was not liable for attorneys' fees, no party or court has "yet undertaken a detailed examination of the contracts at issue." Pet. App. at 30a. Thus, the Sixth Circuit remanded the case "for proper consideration of exactly what fee arrangements are permitted under relevant state laws and under each contract at issue." *Id.* In light of the remand order, Class 4 creditors respectfully suggest that there is no reason to withhold action on the petition pending *Travelers*. Experience teaches that if no action is taken on the

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[4] *See* 11 U.S.C.§ 1124. A claim is impaired unless the plan leaves unaltered the legal, equitable and contractual rights to which the claim entitles the holder.

petition until the decision in *Travelers* issues, it is highly likely that, at most, *certiorari* would the granted for the purpose of remanding for consideration in light of the decision. Respondents respectfully suggest that exactly that will occur—consideration of this issue in light of the disposition in *Travelers*—if the proceedings in the lower courts are permitted to proceed forthwith.

The confirmation of Dow Corning's plan occurred seven years ago. The years since have been spent in various courts over various issues. This case should continue to move forward, even at the present glacial pace. In view of both the "rarity" of the context of a solvent debtor, and the interlocutory nature of the decision below, denial of the petition is appropriate.

CONCLUSION

The petition for *certiorari* should be denied.

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IN THE

Supreme Court of the United States

DOW CORNING CORPORATION,

Petitioner,

v.

OFFICIAL COMMITTEE OF UNSECURED CREDITORS, MERRILL LYNCH, PIERCE, FENNER & SMITH, BANK OF AMERICA, N.A., BANK OF NEW YORK, JP MORGAN CHASE, DK ACQUISITION PARTNERS, L.P., HALCYON MANAGEMENT CO. LLP, HALCYON OFFSHORE MANAGEMENT CO., LLC, ANGELO, GORDON & CO., DAVIDSON KEMPNER INTERNATIONAL ADVISORS, M.H. DAVIDSON CO., INC., APPALOOSA MANAGEMENT, LLC, FRANKLIN MUTUAL ADVISORS, LLC, BEAR STEARNS & CO., INC., BEAR STEARNS GOVERNMENT SECURITIES, INC., BEAR STEARNS INVESTMENT PRODUCTS, INC., CUSTODIAL TRUST CO., NEWSTART FACTORS, INC., FARALLON CAPITAL PARTNERS, L.P., FARALLON CAPITAL INSTITUTIONAL PARTNERS, L.P., FARALLON CAPITAL INSTITUTIONAL PARTNERS II, L.P., FARALLON CAPITAL INSTITUTIONAL PARTNERS III, L.P., FARALLON CAPITAL OFFSHORE INVESTORS, INC., FARALLON CAPITAL MANAGEMENT, LLC, JP MORGAN CHASE BANK, CONSOLIDATED PRESS INTERNATIONAL, THE COMMON FUND, TINICUM PARTNERS LP, CREDIT SUISSE FIRST BOSTON MANAGEMENT CORP., AMROC INVESTMENTS, INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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December 21, 2006

COUNTER STATEMENT OF QUESTIONS PRESENTED

1. Respondent The Bank of New York's interests are not implicated by the first question presented.

2. Where the Court of Appeals could have reversed the lower court's denial of fees and expenses due an indenture trustee on the additional basis of a trustee's entitlement to such fees and expenses under the Trust Indenture Act of 1939, and that entitlement is not at issue in any split between the circuits, is certiorari warranted on the issue of whether the Court of Appeals was correct in holding that the indenture trustee may recover its fees and expenses from a solvent debtor to the extent permitted under its contract and applicable non bankruptcy law?

CORPORATE DISCLOSURE STATEMENT

Respondent The Bank of New York is a wholly owned subsidiary of The Bank of New York Company, Inc., which is a publicly traded company. No parent or publicly held company owns 10% or more of The Bank of New York Company Inc.'s stock.

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INTRODUCTION

The Court should deny the request contained in the petition for a writ of certiorari filed by Dow Corning Corporation ("Dow Corning"), a solvent debtor, seeking to defer consideration of its petition until this Court's resolution of the *Travelers* case, a case addressing a creditor's state-law-based entitlement to reimbursement of its attorneys' fees in bankruptcy. *See Travelers Cas. & Sur. Co. v. PG&E Co.*, 167 Fed. Appx. 593 (9th Cir. 2006) (unpublished), *cert. granted*, 127 S.Ct. 377, 2006 WL 1520766, 75 U.S.L.W. 3020 (U.S. Oct. 6, 2006) (No. 05-1429). In the *Travelers* case, this Court will review a split in the circuits the resolution of which is not necessary to resolve the entitlement of respondent The Bank of New York ("BNY" or the "Trustee") to its fees and expenses. Unlike in *Travelers*, in addition to its right to have its fees and expenses paid under applicable state law principles, BNY is also entitled to its fees and expenses as a trustee qualified under the Trust Indenture Act of 1939 (the "TIA") 15 U.S.C. §§ 77aaa *et seq.*

This additional ground upon which the Court of Appeals could have reversed the lower court is a ground not implicated by the split between the circuits. Therefore, the Court's review of this issue is unnecessary and certiorari should be denied as to BNY's entitlement to fees and expenses.

COUNTER-STATEMENT OF THE CASE

The facts underlying this case are complex and illustrate events that have occurred over an extended period of time. Moreover, the result reached by the Sixth Circuit Court of Appeals (the "Court of Appeals") was based on particular facts that are outside the norm in a bankruptcy context because Dow Corning is a solvent debtor.

1. The Indenture

BNY is the successor indenture trustee under an Indenture, dated as of November 1, 1987 and a First Supplemental Indenture dated as of October 21, 1991 (together, the "Indenture"), by and between Dow Corning and Continental Illinois National Bank and Trust Company of Chicago, as trustee. The Indenture provides for the issuance of unsecured debentures, notes, or other evidence of indebtedness in one or more series (the "Securities") by Dow Corning from time to time.

Pursuant to the Indenture, Dow Corning "covenants and agrees to pay or reimburse the Trustee and each predecessor Trustee upon its request for all reasonable expenses, disbursements and advances incurred or made by or on behalf of it in accordance with any of the provisions of Indenture ...." Indenture, § 6.6, C.A. Joint App. 1767.

The Indenture also provides that the fees and expenses accrued by the Trustee are deemed "additional indebtedness":

> The obligations of the Issuer under this Section to compensate and indemnify the Trustee and each predecessor Trustee and to pay or reimburse the Trustee and each predecessor Trustee for expenses, disbursements and advances shall constitute additional indebtedness hereunder and shall

> survive the satisfaction and discharge of this Indenture.

Id. Since the Trustee's fees and expenses are "additional indebtedness," interest accrues on all unpaid amounts in accordance with section 3.1 of the Indenture. Indenture, § 3.1, C.A. Joint App. 1763 ("The issuer covenants and agrees for the benefit of each series of Securities that it will duly and punctually pay or cause to be paid the principal of, and interest on, each of the Securities of such series (together with any additional amounts payable pursuant to the terms of such Securities).").[1]

Further, section 5.2 of the Indenture provides that, in the event of a default, Dow Corning will pay the Trustee's collection costs:

> [t]he Issuer will pay to the Trustee...such further amount as shall be sufficient to cover the costs and expenses of collection, including reasonable compensation to the Trustee and each predecessor Trustee, their respective agents, attorneys and counsel, and any expenses and liabilities incurred, and all advances made, by the Trustee. . . .[2]

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[1] The Trustee's right to fees, costs, and expenses, and interest thereon, also constitutes a senior claim to that of the Securities and the Trustee has a lien prior to that of the Noteholders (as defined herein) for such amounts. Indenture, § 6.6, C.A. Joint App. 1767 ("Such additional indebtedness shall be a senior claim to that of the Securities upon all property and funds held or collected by the Trustee as such, except funds held in trust for the benefit of the holders of particular Securities or Coupons, and the Securities are hereby subordinated to such senior claim.").

[2] Although Dow Corning was a solvent debtor, it failed to make any scheduled interest payments due on the Securities from May 15, 1995, the date the petition was filed initiating its bankruptcy case, through June 1,

Indenture, § 5.2, C.A. Joint App. 1226. Section 5.2(a) further empowers the Trustee, in the event of Dow Corning's bankruptcy, to file and prove a claim for "reasonable compensation to the Trustee and each predecessor Trustee, and their respective agents, attorneys and counsel, and for reimbursement of all expenses and liabilities incurred, and all advances made, by the Trustee." *Id.*

2. BNY'S Claim and the Rulings Below

On January 14, 1997, BNY timely filed a general unsecured proof of claim (as amended from time to time, the "Claim") on behalf of the holders of certain of the Securities (collectively, the "Noteholders") seeking the outstanding principal, interest, and fees and expenses owed under the Indenture. Claim, C.A. Joint App.1224.

In February 1999, Dow Corning filed its plan of reorganization (the "Plan"). Under the Plan, unsecured claims were classified as "Class 4" and deemed to include, in part, "fees, costs and expenses (including prepayment penalties and liquidated damages), but only to the extent such fees, costs and expenses are allowable under applicable law." Plan, § 5.1, C.A. Joint App. 83. The Plan, as modified, was affirmed by the United States Bankruptcy Court for the Eastern District of Michigan (the "Bankruptcy Court") on November 30, 1999. Order Confirming Amended Joint Plan of Reorganization as Modified, November 30, 1999, C.A. Joint App. 928.

BNY's entitlement to fees, costs and expenses under the Plan was affirmed by the Bankruptcy Court in its December 1, 1999 amended opinion. *In re Dow Corning*

2004, the effective date of the Plan. Accordingly, an event of default existed under the Indenture during this time. *See* Indenture, § 5.1(a), C.A. Joint App. 1764.

Corp., 244 B.R. 678 (Bankr. E.D. Mich. 1999) (finding that "[a] debtor with the financial wherewithal to honor its contractual commitments should be required to do so"). However, despite the clear terms of the Indenture and the December 1, 1999 ruling, Dow Corning objected to BNY's claim for fees, costs, and expenses, arguing, in part, that BNY was not entitled to recover such amounts under "any applicable contractual provisions and/or applicable non-bankruptcy law." Claim Objection No. 85, C.A. Joint App. 1131. BNY moved for summary judgment seeking a ruling that Dow Corning's objection could not be sustained as a matter of law. Motion for Partial Summary Judgment of the Bank of New York With Respect to Objection No.85, C.A. App. 1119. On April 19, 2001, the Bankruptcy Court denied, in part, BNY's summary judgment motion on the issue of fees and costs on the ground that, under applicable law, Class 4 creditors, including BNY, were not entitled to assert contractual claims for fees, costs, and expenses (the "2001 Bankruptcy Court Ruling").[3] C.A. Joint App. 1112-1113.

BNY, along with the committee for commercial creditors (the "Commercial Committee") and other creditors, appealed the 2001 Bankruptcy Court Ruling on the grounds that the ruling substantively modified the Plan and, consequently, the Plan no longer satisfied the requirements of 11 U.S.C. § 1129(b). On March 31, 2004, the United States District Court for the Eastern District of Michigan (the "District Court"), applying an abuse of discretion standard of review, affirmed the 2001 Bankruptcy Court Ruling. C.A. Joint App. 1382. The District Court found that under *Martin v. Bank of Germantown (In re Martin)*, 761 F.2d 1163 (6th Cir. 1985), the unsecured commercial creditors were not entitled to post-petition fees, costs, and expenses because

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[3] This oral ruling was subsequently incorporated by reference in the May 3, 2001 order of the Bankruptcy Court.

such amounts were not incurred in litigating the validity of the contracts. *Id.*

On June 3, 2004, pursuant to the Plan, as modified and confirmed by the District Court, Dow Corning paid to BNY the outstanding principal and interest on the Securities; the Trustee's extraordinary fees, costs and expenses, including its attorneys' fees and expenses, remain unpaid.[4]

3. The Court of Appeals Rules That Attorneys' Fees Should be Allowed

The Court of Appeals reversed the District Court's ruling on attorneys' fees, costs and expenses and stated:

> "If the analogy between the rights of the undersecured creditors to recover interest and that creditors' rights to recover fees, costs and expenses is apt then Class 4 should be able to recover fees, costs and expenses from Dow Corning, a solvent debtor." Pet. App. 23a.

The Court of Appeals expressly found its holding was consistent with the body of cases addressing contract recoveries where a debtor was solvent. *Id.* at 24a. The Court of Appeals considered whether the law in the Sixth Circuit places any limitation upon contractual reimbursement rights for fees and expenses and held that the validity and construction of a contractual claim to such fees is governed by state law. *Id.* at 27a. The Court declined to follow the Ninth Circuit cases that held that attorneys' fees expended litigating issues solely of federal bankruptcy law are not

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[4] In accordance with section 6.6 of the Indenture, the Trustee executed its charging lien against such amounts for its outstanding fees, costs, and expenses, plus a reserve for the costs to pursue the appeal. In the event that BNY is reimbursed for its fees, costs and expenses by Dow Corning, BNY will make a subsequent distribution to the Noteholders to reimburse them for such amounts withheld.

recoverable, noting that the facts of many of those cases were distinguishable from the present case. *Id.* at 29a.

The Court remanded the case for consideration of the fees permitted under specific contracts and applicable state law. *Id.* at 31a.

REASONS THE PETITION SHOULD BE DENIED

Travelers Is Factually Distinguishable Because BNY's Entitlement To Fees Also Derives From The Trust Indenture Act

Dow Corning asserts in its petition that this Court should grant certiorari on its first issue[5], which it describes as the "finality issue", and "[a]t the very least, ... hold the petition pending resolution of *Travelers*."

BNY hereby adopts all of the arguments asserted in the Creditors' Committee Brief in Opposition (the "Committee Opposition") with respect to Dow Corning's Question 2 as well as making an additional argument peculiar to its status in this case as a trustee qualified under the Trust Indenture Act of 1939 (the "TIA") to serve as trustee under the Indenture.

The *Travelers* case is the latest statement by the Ninth Circuit asserting that creditors who otherwise have an entitlement to receive their fees and expenses from a debtor under applicable state law are constrained by federal common law from recovery where the fees and expenses are incurred litigating issues peculiar to federal bankruptcy law.

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[5] As stated in the Sixth Circuit opinion below, 456 F.2d 668, 674 at note 2, BNY as Trustee did not dispute the findings below with respect to default rate or variable interest rates since its position was unaffected by the lower court rulings. As a consequence, this opposition will only address the petition for certiorari with respect to BNY's entitlement to fees and costs under the Indenture.

See Travelers, 167 Fed. Appx. at 594; *In re Pacific Gas and Electric Co.*, No. C-03-3499 PJH (N.D.Cal. Feb.18, 2004). Accordingly, the split in the circuits identified and to be addressed by the Supreme Court will only address that issue.

BNY, in addition to its contractual rights under the Indenture to receive its fees and expenses to the extent allowable under New York law, is also entitled to its fees by virtue of its status as a Trustee qualified under the TIA. While the Court of Appeals did not directly address this point in its decision, it recognized the distinction[6] but was not required to address the argument based upon its broader holding that entitlement to fees and expenses under applicable non-bankruptcy law was sufficient to provide for recovery for fees and expenses from a solvent debtor.

BNY's entitlement to its fees and expenses as a Trustee qualified under the TIA is an additional ground on which the Court of Appeals could have reversed the lower court and a ground not addressed by the split between the circuits. BNY raised this issue below and it was before the Sixth Circuit.

The expectation of any purchaser of public debt is that its debt will be paid in full prior to any return to the shareholders of the debtor. The Trust Indenture Act of 1939, the act under which the Indenture between Dow Corning and the Noteholders is qualified, made such expectation the law.

In 1939, Congress enacted the Trust Indenture Act to protect the holders of public debt and ensure the national public interest in integrity of the marketplace. 15 U.S.C. §§ 77aaa *et seq.* (1939). The "TIA is part of the large and complicated body of federal law covering securities transactions .... As a securities statute, it is designed to

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[6] 456 F.2d at 674, note 2.

vindicate a federal policy of protecting investors." *In re Nucorp Energies Securities Litigation*, 772 F.2d 1486, 1489 (9th Cir. 1985) (citations omitted). By adopting a mechanism that (1) appointed an indenture trustee to guard against infringement of the debt holders' interest and (2) required public disclosure by the obligor upon which the investor could rely, the TIA effected a means for the bondholder to receive "adequate current information with respect to [an obligor's] financial condition and the performance of its obligations under the indenture." S. Rep. No. 76-248, 76th Cong., 1st Sess. 3626-3654 (1939). Indeed, pursuant to 15 U.S.C. § 77fff(c), it is unlawful to sell debt securities to the public unless they are issued pursuant to a TIA qualified indenture. To qualify under the TIA, the indenture must contain the provisions set forth in 15 U.S.C. §§ 77jjj - 77qqq, and if they are not in the indenture, they apply automatically as a matter of law. *See* 15 U.S.C. § 77rrr(c).

As guardian of the debt holders' interests under the TIA, the Trustee is endowed with special powers, "the first of these is the power . . . to recover judgment against the obligor for the *whole* amount due and unpaid, in the event of a principal default, or an interest default. . . ." 15 U.S.C. § 77qqq(a)(1) (emphasis added). The indenture itself serves as a contract upon which the public investor can rely. S. Rep. No. 76-248, at p. 3628, and Congress emphasized this mandate for payment in full twice in the TIA, once as a right of the bondholders and a second time as a power of the indenture trustee. *See* 15 U.S.C. §§ 77ppp and 77qqq. Congress intended to safeguard full payment on the contract to the public debt holder, including the whole amount of the fees, costs, and expenses incurred by the indenture trustee, for which the obligor contracted and any subsequent purchasers traded. Thus, for the bondholder, an important protection of TIA is the uncompromised right to payment. *See* 15 U.S.C. § 77ppp(b). Such rights are "absolute and

unconditional." *UPIC & Co. v. Kinder Care Learning Centers,* 793 F. Supp. 448, 455 (S.D.N.Y. 1992)."[7]

While the Court of Appeals did not reach the separate issue briefed by BNY in connection with its entitlement to fees and expenses, such argument constitutes a separate and valid basis upon which the court could have reached the issue without implicating the split in the circuits to be addressed in *Travelers.* Accordingly, if the Court does not otherwise determine to deny certiorari on the grounds set forth in the Committee's Opposition, BNY submits, that with respect to its claim, certiorari should not be granted.

[7] Dow Corning addressed this argument in its reply asserting that BNY had waived the argument below and attempting to limit fees recoverable under the TIA to limited situations. BNY, in its reply, responded to these assertions by focusing on the trustee's and holder's rights to payment of the "whole amount" owed and explained that 15 U.S.C. § 77ooo(e), an allegedly limiting provision, at most provides that in a suit instituted by the trustee (which this action is not), if the parties do not agree, the court may in its discretion assess reasonable costs.

CONCLUSION

The petition for writ of certiorari should be denied and not held pending the resolution of *Travelers*.

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Petitioner,

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In *Travelers Cas. & Sur. Co. of Am. v. Pacific Gas & Elec. Co.*, No. 05-1429 (Slip op. Mar. 20, 2007), this Court held that an unsecured creditor's contract-based claim for attorney's fees could not be disallowed solely because the fees at issue were incurred litigating issues of bankruptcy law. *See id.* at 5-10 (rejecting *In re Fobian*, 951 F.2d 1149 (9th Cir. 1991)). The opinion, however, expressly declined to decide whether an award of attorney's fees on an unsecured claim is precluded by the Bankruptcy Code in 11 U.S.C. § 506(b). *See id.* at 10-12. As the Court explained, the § 506(b) issue was not properly presented in that case, because the respondent there had not raised the issue either below (such that "none of the lower courts had occasion to address it") or in the brief in opposition to the petition for certiorari. *Id.* at 11.

This case, in sharp contrast, allows this Court to resolve this unsettled issue. Petitioner Dow Corning raised the § 506(b) issue below, the Sixth Circuit addressed that issue at length, *see* Pet. App. 20-24a, and the issue is encompassed by the second question presented in the petition for certiorari, *see* Pet. i.

In particular, Dow Corning argued below that because § 506(b) specifically authorizes the recovery of attorney's fees for oversecured claims, but does not authorize the recovery of such fees for unsecured claims, the Bankruptcy Code implicitly bars the recovery of such fees for unsecured claims. *See* Pet. App. 21a (describing Dow Corning's argument). The Sixth Circuit squarely rejected that argument. According to the Sixth Circuit, the negative implication of § 506(b) was not sufficiently strong to bar the recovery of attorney's fees for unsecured claims. *See id.* at 22-24a.

That decision flatly contradicts both the reasoning of a prior decision of this Court and a long line of holdings from various other circuits and bankruptcy courts. In *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assoc., Ltd.*, 484 U.S. 365 (1988), this Court held that

§ 506(b) implicitly bars the recovery of post-petition interest by undersecured creditors. As the Court explained, Congress went out of its way to make § 506(b) applicable *only* to oversecured claims. *Id.* at 373. If Congress had intended to grant an undersecured creditor the same rights, it would not have limited the statute to claims "secured by property the value of which ... is greater than the amount of such claims." *Id.* Although *Timbers* involved a claim for post-petition interest, not attorney's fees, its reasoning applies with equal force with respect to both claims. *See* Br. of *Amici Curiae* Law Professors in Support of Resps., *Travelers Cas. & Sur. Co. of Am. v. Pacific Gas & Elec. Co.*, No. 05-1429, at 8 ("Section 506, which deals with attorneys' fees, as well as interest, should have the same substantive effect of disallowing postpetition attorneys' fees for undersecured creditors, and by extension for wholly unsecured creditors as well.").

The Sixth Circuit's holding also contradicts a long line of cases construing § 506(b) to authorize awards of fees and costs only to oversecured creditors. *See, e.g., In re Welzel*, 275 F.3d 1308, 1317-18 (11th Cir. 2001) (holding that § 506(b) affords "preferential treatment" to oversecured claims); *In re Schriock Const., Inc.*, 104 F.3d 200, 201 (8th Cir. 1997) ("To recover attorney's fees under section 506(b), then, a creditor must establish ... that it is oversecured"); *Baybank-Middlesex v. Ralar Distributors, Inc.*, 69 F.3d 1200, 1202 (1st Cir. 1995) ("Under [§ 506(b)], only 'oversecured' creditors are entitled to receive postpetition interest and loan-related fees and costs [including attorney's fees]."); *see also In re Hedged-Inv. Assocs., Inc.*, 293 B.R. 523, 526 (Bankr. D. Colo. 2003); *In re Loewen Group Int'l, Inc.*, 274 B.R. 427, 444-45 (Bankr. D. Del. 2002); *In re Smith*, 206 B.R. 113, 115 (Bankr. D. Md. 1997); *In re Woodmere Investors Ltd. P'ship, Inc.*, 178 B.R. 346, 355-56 (Bankr. S.D.N.Y. 1995); *In re Saunders*, 130 B.R. 208, 210 (Bankr. W.D. Va. 1991); *In re Sakowitz, Inc.*, 110 B.R. 268, 272 (Bankr. S.D. Tex. 1989).

In reaching its decision, the Sixth Circuit relied instead on a line of cases espousing the minority view that § 506(b) does not authorize awards of fees and costs only to oversecured creditors. *See* Pet. App. 23-24a (citing *In re United Merchants & Mfrs., Inc.*, 674 F.2d 134, 137 (2d Cir. 1982); *In re Fast*, 318 B.R. 183, 194 (Bankr. D. Colo. 2004); *In re New Power Co.*, 313 B.R. 496, 510 (Bankr. N.D. Ga. 2004); *In re Carter*, 220 B.R. 411, 418 (Bankr. D.N.M. 1998)); *see also Matter of 268 Ltd.*, 789 F.2d 674, 678 (9th Cir. 1986) (construing § 506(b) as allowing fees to unsecured creditors). This case thus allows this Court to answer the question left open in *Travelers* and to resolve the conflict among the lower courts on this important issue of bankruptcy law.[1]

In addition, the first question presented in Dow Corning's petition for certiorari is worthy of review in its own right. Separate and apart from the § 506(b) issue, the Sixth Circuit held that a party may collaterally attack a final confirmation order by asserting that the order violates the Bankruptcy Code. That holding undermines the core principle of finality that is imperative to the functioning of the bankruptcy system. *See* Pet. 8-9, 14-15. The holding also directly contradicts holdings from the Fourth, Fifth and Ninth Circuits. *See id.* at 10-13. Whether in conjunction with the § 506(b) issue or separately, this question warrants review by this Court.

---

[1] Notwithstanding the Sixth Circuit's suggestion to the contrary, it makes no difference that Dow Corning is a solvent debtor. This Court's statement in *Timbers* that both undersecured and oversecured creditors can recover post-petition interest when the debtor is solvent, *see* 484 U.S. at 379, is based entirely on the fact that such recovery is explicitly allowed by the Bankruptcy Code, *see* 11 U.S.C. § 726(a)(5). There is no similar provision allowing for the recovery of attorney's fees when the debtor is solvent.

For these reasons, and for the reasons stated in the Petition for Certiorari and Reply to Briefs in Opposition, this Court should grant the petition for certiorari.

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(3)

No. 06-705

IN THE

Supreme Court of the United States

DOW CORNING CORPORATION,

Petitioner,

v.

OFFICIAL COMMITTEE OF UNSECURED CREDITORS, MERRILL LYNCH, PIERCE, FENNER & SMITH, BANK OF AMERICA, N.A., BANK OF NEW YORK, JP MORGAN CHASE, DK ACQUISITION PARTNERS, L.P., HALCYON MANAGEMENT CO. LLP, HALCYON OFFSHORE MANAGEMENT CO., LLC, ANGELO, GORDON & CO., DAVIDSON KEMPNER INTERNATIONAL ADVISORS, M.H. DAVIDSON CO., INC., APPALOOSA MANAGEMENT, LLC, FRANKLIN MUTUAL ADVISORS, LLC, BEAR STEARNS & CO., INC., BEAR STEARNS GOVERNMENT SECURITIES, INC., BEAR STEARNS INVESTMENT PRODUCTS, INC., CUSTODIAL TRUST CO., NEWSTART FACTORS, INC., FARALLON CAPITAL PARTNERS, L.P., FARALLON CAPITAL INSTITUTIONAL PARTNERS, L.P., FARALLON CAPITAL INSTITUTIONAL PARTNERS II, L.P., FARALLON CAPITAL INSTITUTIONAL PARTNERS III, L.P., FARALLON CAPITAL OFFSHORE INVESTORS, INC., FARALLON CAPITAL MANAGEMENT, LLC, JP MORGAN CHASE BANK, CONSOLIDATED PRESS INTERNATIONAL, THE COMMON FUND, TINICUM PARTNERS LP, CREDIT SUISSE FIRST BOSTON MANAGEMENT CORP., AMROC INVESTMENTS, INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY TO BRIEFS IN OPPOSITION

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INTRODUCTION

The briefs in opposition show not only that this Court's review is warranted, but that summary reversal may be appropriate. Respondents insist that "[petitioner's] solvency ... brought into play legal principles that arise very rarely [under] Chapter 11" of the Bankruptcy Code. Br. in Opp. of Unofficial Comm. of Unsecured Creditors *et al.* ("Creditors Opp.") 3. But neither of the two questions presented in the petition has anything to do with such principles. The first question involves the preclusive effect of a failure to appeal a confirmation order, and the second question involves entitlement to attorneys' fees.

With respect to the first question, respondents cannot, and do not, deny that three federal courts of appeals (the Fourth, Fifth, and Ninth Circuits) have squarely held that parties may not collaterally attack the legality of confirmed plans of reorganization. *See, e.g.*, *Stratosphere Litig. L.L.C. v. Grand Casinos, Inc.*, 298 F.3d 1137, 1143 (9th Cir. 2002); *In re Varat Enters., Inc.*, 81 F.3d 1310, 1315-17 (4th Cir. 1996); *Republic Supply Co. v. Shoaf*, 815 F.2d 1046, 1050 (5th Cir. 1987). Rather, respondents simply insist that they have not done so. But the Sixth Circuit expressly *rejected* respondents' challenge to the bankruptcy court's interpretation of petitioner's confirmed plan, *see* Pet. App. 12-14a, except insofar as that interpretation would violate the Bankruptcy Code, *see id.* at 14-19a. The key point, of course, is that the Sixth Circuit had no basis for reaching respondents' challenge to the plan's legality after disposing of respondents' challenge to the plan's meaning. Respondents may not wish to defend the Sixth Circuit's approach, but they cannot simply wish it away.

With respect to the second question presented, respondents oppose petitioner's request for this Court at least to hold the petition pending the forthcoming decision in *Travelers Cas. & Sur. Co. v. PG&E Co.*, 167 Fed. Appx.

593 (9th Cir.) (unpublished), *cert. granted*, 127 S. Ct. 377 (2006) (No. 05-1429) (oral argument scheduled for Jan. 16, 2007). Respondents try to distinguish *Travelers* on factual grounds, but they cannot, and do not, deny that the Sixth Circuit concededly decided the attorneys' fees issue under a legal standard different from the standard applied in the Ninth Circuit. Because this Court granted certiorari in *Travelers* to resolve the circuit conflict on this precise question, at the very least the Court should hold the petition pending the resolution of that case.

At bottom, respondents cannot, and do not, deny that each of the two questions presented in the petition involves an important issue of federal bankruptcy law (and indeed the second question is already pending before this Court). Respondents certainly cannot avoid this Court's review of the first question (either by plenary briefing on the merits or summary reversal) by simply denying that the Sixth Circuit held what it did. If anything, this case presents the first question in an unusually clean and stark manner, because the Sixth Circuit separated its analysis into two parts, the first addressed to the bankruptcy court's interpretation of the confirmed plan, *see* Pet. App. 12-14a, and the second addressed to the plan's legality as thus interpreted, *id.* at 14-19a. Accordingly, this Court should grant certiorari, and either set the case for plenary briefing or summarily reverse the decision below.

REASONS FOR GRANTING THE WRIT

I. The Finality Issue

Respondents base their argument that "there is no conflict among the circuits concerning collateral attack on a confirmed plan of reorganization," Creditors Opp. 8 (capitalization modified), on the premise that the Sixth Circuit *reversed* the bankruptcy court's interpretation of the confirmed plan wholly apart from any dispute over the plan's legality. But just the opposite is true: the Sixth Circuit expressly held that the bankruptcy court did *not*

abuse its discretion in interpreting the confirmed plan of reorganization except insofar as the plan, as thus interpreted, would violate the law. *See* Pet. App. 12-14a.

Because respondents' substantive position is based on a distortion of the relevant procedural history, it is worth briefly recapping that history. Respondents assert over and over again that the bankruptcy court "sustained" their objection to the plan originally proposed by Dow Corning. Creditors Opp. 2, 4, 5, 6, 10 (emphasis omitted). But that assertion is only partially true. The bankruptcy court sustained respondents' objection to the extent they claimed that they were entitled to pendency interest at contractual (as opposed to statutory) rates, but overruled respondents' objection to the extent they claimed that they were entitled to pendency interest at the contractual default (as opposed to base) rates. In particular, the bankruptcy court's 1999 order confirming the plan provided as follows:

> [T]he Court deems the Plan to have been verbally amended to provide that pendency interest will be paid to Class 4 creditors *in accordance with the terms of the parties' contracts.* In determining the applicable rate, however, *no effect is to be given to contractual provisions which purport to define as a default the filing of a voluntary petition for bankruptcy relief. Cf., e.g.*, 11 U.S.C. §§ 363(l), 365(b)(2), 365(e)(1)(B) and 541(c)(1)(B) (stating in various contexts that such a provision is unenforceable); *see generally In re James Cable Partners, L.P.*, 154 B.R. 813, 816 (M.D. Ga. 1993), *aff'd*, 27 F.3d 534 (11th Cir. 1994) (referring to "a basic bankruptcy policy that abhors the operation of so-called 'ipso facto' clauses[,] ... which trigger a default ... upon the happenstance of bankruptcy" (citation omitted)); *In re Chedick*, No. 95-01096, 1996

> WL 762329, at *3 (Bankr. D.D.C. Mar. 22, 1996) ("The 5% fee due when a bankruptcy petition is filed is void as a matter of public policy."); *In re Hutchins*, 99 B.R. 56, 57 (Bankr. D. Colo. 1989) ("Bankruptcy default clauses are not favored and are generally unenforceable under the Bankruptcy Code."); *In re Perry*, 25 B.R. 817, 820 (Bankr. D. Md. 1982) (*en banc*; *per curiam*) (Enforcement of "bankruptcy clauses ... would result in forfeitures contrary to the spirit of the Code, a result which courts of equity strain to avoid.").

In re Dow Corning Corp., 244 B.R. 678, 696 (Bankr. E.D. Mich. 1999) (emphasis added). At the very least, the foregoing passage should have put respondents on notice that they could not assume that "pendency interest ... in accordance with the terms of the parties' contracts," *id.*, meant interest at the contractual default (as opposed to base) rates. But respondents neither appealed nor even sought clarification of that ruling.

Rather, respondents waited until petitioner subsequently objected to their proofs of claim to the extent they sought pendency interest at the contractual default rates, and then moved for summary judgment. In 2001, the bankruptcy court (the same court that had confirmed the plan just over a year earlier) denied respondents' motion. As the court explained, "a straightforward application of the plan terms would mean that [respondents] are entitled only to the *base* contract rate of interest." Pet. App. 58a (emphasis added); *see also id.* at 60a ("[T]he Court does not see how one can reconcile [a] demand for default-rate interest with the plan's provision for application of the interest rate in effect when [petitioner] filed its [Chapter 11] petition.").

Although respondents now characterize the bankruptcy court's 2001 decision interpreting the

confirmed plan as "inexplicabl[e]," "astonishing[]," and "completely at odds with its earlier ruling," Creditors Opp. 2, 5, 6, the Sixth Circuit did not see things that way. Rather, the Sixth Circuit expressly held that the bankruptcy court did *not* abuse its discretion in interpreting the confirmed plan, except insofar as the plan, as thus interpreted, would violate the Bankruptcy Code. *See* Pet. App. 12-14a.

Indeed, the Sixth Circuit separated its analysis of the "[m]erits" of this case into two distinct parts. *First*, in subsection 2.a, the Sixth Circuit addressed respondents' argument that the bankruptcy court "incorrectly interpret[ed] its prior language [in the confirmed plan] and thus effectively modif[ied] the plan." *Id.* at 11a. *Second*, in subsection 2.b, the Sixth Circuit addressed respondents' argument that the bankruptcy court's "interpretation of the plan caused it to violate § 1129(b)'s fair-and-equitable standard." *Id.* at 11-12a.

The Sixth Circuit squarely rejected respondents' first argument, regarding plan interpretation. As the court explained, "[respondents] argue that the language in the bankruptcy court's 1999 decision can *only* be interpreted as providing for pendency interest at the contracts' default rates." *Id.* at 12a (emphasis added). Although the Sixth Circuit "disagree[d] with the bankruptcy court's conclusion that the plan was unambiguous" on this point, the appellate court held that "the bankruptcy court's ultimate interpretation of that language did not constitute an abuse of discretion." *Id.* at 13-14a; *see also id.* at 14a ("[Respondents] have not met the extremely difficult burden of demonstrating on appeal that the bankruptcy court incorrectly interpreted its own prior language or intent."); *id.* ("[T]he bankruptcy court cannot be said to have abused its discretion by interpreting its own words incorrectly.").

Under 11 U.S.C. § 1141(a), which provides that a confirmed plan of reorganization is final and binding, that

should have been the end of the matter—and would have been the end of the matter in the Fourth, Fifth, and Ninth Circuits. *See, e.g.*, *Stratosphere*, 298 F.3d at 1143; *Varat*, 81 F.3d at 1315-17; *Republic Supply*, 815 F.2d at 1050. The Sixth Circuit, however, proceeded to address respondents' alternative argument that the plan, if interpreted to provide for pendency interest at the contractual base rates, would violate the Bankruptcy Code. *See* Pet. App. 14a ("Although the bankruptcy court did not abuse its discretion by interpreting the plan as requiring the payment of pendency interest at a non-default, fixed rate, the bankruptcy court still may have done so if it construed the plan in such a way as to cause it to violate § 1129(b)'s fair and equitable requirement."); *id.* ("[Respondents] argue[] that the bankruptcy court abused its discretion by interpreting the plan in such a way as to produce a result that violates [§ 1129(b)] of the Bankruptcy Code."). And the Sixth Circuit proceeded to grant respondents relief based on that statutory argument, holding that the confirmed plan (as otherwise reasonably interpreted by the bankruptcy court per subsection 2.a) might nonetheless violate § 1129(b). The Sixth Circuit therefore reversed the district court's decision upholding the bankruptcy court's decision, and remanded the case to allow respondents to prove that plan violated that provision. *See* Pet. App. 19a, 31a.

By proceeding to address respondents' statutory challenge to the confirmed plan *after* concluding that the bankruptcy court (independent of that challenge) had reasonably interpreted the plan, the Sixth Circuit unambiguously "permit[ed] collateral attack upon a final confirmation order." Creditors Opp. 8. Respondents purport to distinguish the cases cited by petitioner on the ground that in those cases "the party bringing a true collateral attack failed to assert an objection to confirmation of a plan," whereas here respondents not only objected to the plan, but "*[t]he Bankruptcy Court ruled in [their] favor.*" *Id.* at 9 (emphasis added). As

noted above, the latter assertion is misleading at best. The bankruptcy court ruled in respondents' favor only on the (now irrelevant) issue of statutory vs. contractual interest rates, but ruled against them on the distinct issue (presented here) of base vs. default contractual interest rates. *Dow Corning*, 244 B.R. at 696. Although respondents have argued at every stage of this litigation that the confirmed plan "can only be interpreted as providing for pendency interest at the contracts' default rates," Pet. App. 12a, they have *lost* on that critical issue at every stage, including the Sixth Circuit, *see id.* at 13-14a, 47-49a, 58-59a.

What respondents are doing, in other words, is defending the Sixth Circuit's decision to reach their statutory challenge to the confirmed plan, *see id.* at 14-19a (subsection 2.b), by simply denying the Sixth Circuit's antecedent decision with respect to plan interpretation, *see id.* at 12-14a (subsection 2.a). But it is precisely because respondents lost on the issue of plan interpretation (independent of their challenge to plan legality) that this case squarely presents a "collateral attack upon a final confirmation order." Creditors Opp. 8. Respondents cannot avoid the collateral nature of their attack by falsely implying that they won below on the threshold issue of plan interpretation. *See id.* at 9-10. Under the confirmed plan, as interpreted by the bankruptcy court and affirmed by the Sixth Circuit (independent of respondents' statutory challenge), respondents *lost* on the issue of base vs. default contractual interest rates. Accordingly, respondents should have appealed the confirmation order (or at least, to the extent they thought the plan was ambiguous, moved to clear up any such ambiguity). *In re Harvey*, 213 F.3d 318, 322 (7th Cir. 2000); *In re Szostek*, 886 F.2d 1405, 1413-14 (3d Cir. 1989); *In re Haynes*, 107 B.R. 83, 86 (Bankr. E.D. Va. 1989). Because respondents failed to object to the confirmed plan to the extent that it provided for pendency interest at base (as opposed to default)

contractual rates, this case is indistinguishable from the cases cited by petitioner, all of which refused to entertain collateral attacks on the legality of a confirmed and final reorganization plan. *See Stratosphere*, 298 F.3d at 1143; *Varat*, 81 F.3d at 1315-17; *Republic Supply*, 815 F.2d at 1050.

By allowing respondents to pursue such a collateral attack (regardless of whether they ultimately prevail),[1] the Sixth Circuit has destabilized the law and undermined core principles of finality. Given that the whole point of bankruptcy reorganization is to give the debtor a fresh start, *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934), it is imperative that both a debtor and its creditors understand the extent and scope of the debtor's liabilities under a confirmed and final plan of reorganization. Needless to say, such finality (and the stability and predictability it fosters) will vanish if a plan can always be challenged as unlawful. It is hard to imagine an issue of greater importance to the effective administration of the Nation's bankruptcy laws. Accordingly, this Court should either set this case for plenary briefing, or summarily reverse the decision below.

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[1] Respondents note in passing that the decision below is "interlocutory," Creditors Opp. 2, which is obviously true in the sense that the Sixth Circuit remanded for a determination whether pendency interest at the base (as opposed to default) contractual rates would satisfy the "fair and equitable" standard of 11 U.S.C. § 1129(b), *see* Pet. App. 19a. But petitioner is challenging the Sixth Circuit's decision even to reach that issue as a matter of law, so the challenge is ripe for review regardless of what happens on remand. Indeed, many of this Court's cases have arisen in precisely this procedural posture, where the Court of Appeals has established the relevant legal standard and remanded for application of that standard. *See, e.g., Randall v. Sorrell*, 126 S. Ct. 2479 (2006); *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49 (2005); *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398 (1999).

II. The Attorneys' Fees Issue

Respondents urge this Court not even to hold this petition pending the resolution of *Travelers*, which involves the attorneys' fees issue set forth in the second question presented, on the ground that "[t]he facts in the present case are materially different from the facts in the *Travelers* case." Creditors Opp. 11. Essentially, respondents argue that the claims at issue here are fundamentally contractual in nature, rather than based on the Bankruptcy Code, *see id.*—which is an odd argument for them to make, given that they obtained relief from the Sixth Circuit based on their interpretation of § 1129(b) of the Bankruptcy Code.

In any event, the Sixth Circuit certainly did not think that respondents' arguments were independent of the Bankruptcy Code, and did not purport to distinguish the Ninth Circuit precedents cited by petitioner on that basis. To the contrary, the Sixth Circuit expressly "decline[d] to follow the series of Ninth Circuit cases relied upon by [petitioner], which limit the recovery of attorneys' fees, costs and expenses to those incurred in enforcing the contract." Pet. App. 28a; *see also id.* at 29a ("[W]e recognize that the Ninth Circuit has squarely held that, even if provided for by contractual provisions valid under state law, creditors may never be awarded attorneys' fees expended litigating issues solely of federal bankruptcy law.") (citing, *inter alia*, *Thrifty Oil Co. v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 322 F.3d 1039, 1040-42 (9th Cir. 2003)); *id.* ("We do not find the reasoning of *Thrifty Oil* persuasive."). Because the Sixth Circuit did not distinguish the Ninth Circuit cases on the facts, respondents' ostensible factual distinctions miss the point, and a hold for *Travelers* is clearly warranted.[2]

---

[2] Respondent Bank of New York (BNY) makes a related argument against a hold. According to BNY, the Sixth Circuit

Respondents' argument that a hold is unwarranted because "the Court of Appeals' decision is interlocutory," Creditors Opp. 11, is equally unpersuasive. While it is true that the Sixth Circuit remanded the case "for proper consideration of exactly what fee arrangements are permitted under the relevant state laws and under each contract at issue," Pet. App. 30a, it is also true that the Sixth Circuit squarely decided the legal issue presented in *Travelers*, and (as noted above, *see supra* n.1) a remand is no bar to this Court's review of an important legal question decided by the Court of Appeals. Indeed, respondents' request for "the proceedings in the lower courts ... to proceed forthwith" on the attorneys' fees issue, Creditors Opp. 12, makes little sense, since the law governing such proceedings will not be settled until this Court renders its decision in *Travelers*. What respondents think would be gained by a remand under such circumstances, other than evading this Court's review, is a mystery.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, this Court should grant the petition for writ of certiorari and either set the case for briefing on the merits or summarily reverse the decision below.

"could have" resolved the attorneys' fees issue in BNY's favor without implicating the circuit conflict in *Travelers*, but did not do so. *See* BNY Opp. 1, 8, 10. The short answer to that argument is that this Court reviews actual, not hypothetical, rulings. Because the Sixth Circuit actually resolved the attorneys' fees issue in favor of *all* respondents (including BNY) on the basis of the legal issue presented in *Travelers*, a hold is warranted for all respondents. In any event, as a practical matter, a single petition cannot be held with respect to some respondents but not others, so it is not clear what BNY even hopes to accomplish with this argument.

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